Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

Carol Ann Levine

Petitioner

v.

Regents of the University of California and Reginald Zelnik

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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17pp

QUESTIONS PRESENTED

1) California Civil Code section 52.1, AKA The Tom Bane Civil Rights Act, protects "**any individual**" from threats, intimidation or coercion which interferes with "rights secured by the Constitution or laws of the United States, or...this state .... " Did a California Appellate Court abuse its discretion and violate Amendment XIV to the United States Constitution, denial of equal protection of laws, when it decided that the Petitioner did not qualify for this protection because she no longer held the status of employee/applicant at the University upon whose premises the alleged Bane Act violations took place?

2) As a matter of public policy can a federally funded University be exempt from complying with a state law, such as the Tom Bane Civil Rights Act which guarantees "any person" protection from interference with "rights secured by the Constitution or laws of the United States" because the alleged victim was not an employee/applicant?

3) Does retaliation for exposing sexual harassment, long term unpaid labor and plagiarism, under threat of the equivalent of destroying a career (i.e. block graduation after more than a dozen years of academic work), as was alleged in this case, violate the freedom of speech guaranteed by Amendment I of the United States Constitution?

4) Can an Appellate Court properly rule that sexual harassment in the workplace is not by its very nature outrageous conduct?

5) Can an Appeal Court rule that no authority exists for a new attorney to correct admittedly erroneous allegations of a previous attorney?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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APPENDIX C: December 15, 1999 Supreme Court of the State of California's denial of Petitioner's writ of review.

APPENDIX D: Correspondence from the Petitioner's graduate advisor, Zelnik, expressing pleasure at the Petitioner's improvement during a medical leave of absence and mapping out future academic plans.

APPENDIX E: Letter from the University of California at Berkeley History Department Chair verifying that the Petitioner held official status as a non-registered graduate student. University of California at Berkeley Library documentation demonstrating "non-registered graduate student" as an official category of library users.

APPENDIX F: December 13, 1999 Amicus letter to the State of California Supreme Court by Susan Berk Fogel, Esq. and Paula Pearlman, Esq. Of the California Women's Law Center.

TABLE OF AUTHORITIES CITED

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RELATED RESEARCH

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Klein, F. and Rowe, M. Estimating the cost of sexual harassment to the Fortune 500, service and manufacturing firms. Testimony on H.R.I before the House of Representatives Committee on Education and Labor, 102nd Cong., 1st Sess. 169, 209 (1991) In the California Woman's Law Center amicus letter for Levine v. U.C. Regents Supreme Court No. S083172; 1st App. Dist. No. A083084: Alameda Co. Superior Court No. 757295-3 authored by Fogel, Susan Berke and Pearlman, Paula D. December 13, 1999.

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improve the education of women, 15-17, 19, National Association for Women in Education (1996) In the California Woman's Law Center amicus letter for Levine v. U.C. Regents Supreme Court No. S083172:1st. App. Dist. No. A083084; Alameda Co. Superior Court No. 757295-3 authored by Fogel, Susan Berke and Pearlman, Paula D. December 13, 1999.

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District No. A083084, Alameda County Superior Court No. 757295-3, authored by Susan Berk Fogel and Paula D.Pearlman.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is unpublished.

The opinion of the Superior Court of the County of Alameda, California appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was September 17, 1999. A copy of that decision appears in Appendix B.

A timely petition for rehearing was thereafter denied by the Supreme Court of California on the following date: December 15, 1999 and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV, Section 1. – Citizenship rights not to be abridged. By incorrectly denying the Petitioner rights secured by the United States Constitution under California's Tom Bane Civil Rights Act, the California Courts violated the XIV Amendment's prohibition against any State denying "to any person within its jurisdiction the equal protection of the laws."

United States Constitution Amendment I – Freedom of Speech. By denying the Petitioner recourse against intimidation and coercion which prevented her from reporting sexual harassment, plagiarism of her long term academic work, and long term unpaid labor, the California Courts abridged and deprived her of freedom of speech.

California Civil Code section 52.1, also known as the Tom Bane Civil Rights Act and which states that all persons are protected from threats, intimidation and coercion which interferes with "rights secured by the Constitution or laws of the United States, or ...this state...." The California Courts incorrectly denied the Petitioner protection under this law because they deemed her not to have been in the employee/applicant status when the alleged offenses occurred.

STATEMENT OF THE CASE

The Petitioner begs the Court's indulgence since she is petitioning in propria persona. She also asks that the Court hold her pleadings to less stringent standards as per Haines v. Kerner 404 U.S. 519, 592 S Ct 594, 30L. Ed. .2d 652 (1972)

Background - Petitioner Carol Ann Levine became a registered graduate student at the University of California at Berkeley in 1979, for the purposes of pursuing a co-joint Ph. D. degree and law degree through demonstrated ability in original research in history and intellectual property, and with the goal of an academic

career. Her graduate advisor and mentor in the History Department was at all times herein mentioned, Professor Reginald E. Zelnik. The University of California at Berkeley is the recipient of federal funding.

The Petitioner pursued her degree as a registered graduate student from 1979 through 1981 when Zelnik sanctioned and encouraged her to take a leave of absence to address a temporary medical problem. (Appendix D)

The Petitioner took leave for most of a University quarter to resolve the medical issue and returned the following quarter. Upon her return later in 1981, Zelnik advised her to continue her degree pursuit as a non-registered graduate student, a common, recognized category, designed to save graduate students tuition expenses. The History Department issued her documentation certifying her status as a non-registered graduate student and requesting that the University library furnish her with a library card. As designated on official University of California letterhead, one of several official categories of University Library usage is "non-registered graduate student". (See Appendix E for the History Department's documentation and library card issued by the University library in 1992 in the Petitioner's name, while she was a non-registered graduate student.) The Petitioner was aware of other graduate students and their advisors following this same practice.

After resuming graduate study in the non-registered status, the Petitioner became subject to a long term course of conduct by Zelnik characterized by repeated sexual harassment, threats, intimidation, long term coerced unpaid work, plagiarism and physical assaults and batteries. The latter included sexual batteries such as touching or fondling her buttocks, even in the presence of others.

During the time of the harassment, Zelnik repeatedly promised the Petitioner that he would see her through the completion of her degree and re-register her when it would become necessary, such as during the quarter when the degree was to be completed. Anytime she protested his transgressions or threatened to expose them, he threatened to block her graduation and, thus, abort her career.

After she ultimately exposed him by revealing his role in the plagiarism, the Petitioner became subject of retaliation for her freedom of speech, in violation of her First Amendment rights – re-registration and achievement of her degree was blocked.

At times when the Petitioner requested re-registration, Zelnik fraudulently told her that he was powerless to intercede on her behalf, when, in fact, he had unilateral discretion and control to approve her for re-registration. He refused to exercise his discretion because plaintiff refused to have sex with him. This was especially true after Zelnik became head of the History Department. The Petitioner did not discover Zelnik's fraudulent conduct until March, 1995, shortly after Zelnik became the History Department's chair.

The student-teacher relationship as well as the harassment, discrimination and wrongful denial of re-admission continued through April of 1995. The ultimate result was that the Petitioner was prevented from realizing both a Ph. D. degree and a law degree and the career that she intended to use these to achieve.

On May 15, 1995 the Petitioner complained of Zelnik's transgressions to Associate Dean of the University of California at Berkeley Graduate Division, Joseph Duggan. A number of meetings and their communications extended into 1996. Duggan

told the Petitioner that she had no civil recourse against Zelnik's alleged sexual harassment, assaults and batteries, threats, intimidation, or interference with her civil rights.

After exhausting her administrative remedies, in September, 1995 the Petitioner filed a complaint making several allegations, including that oppressive acts by Zelnik and the History Department violated her protection under the Bane Civil Rights Act since they deprived her of her rights under the Constitution of the United States, including Amendment I's freedom of speech and Amendment XIV's denial of equal protection of the laws;

Related Research – University professors have power over their students in a number of ways, such as awarding grades, providing or withholding positive recommendations and ultimately graduation. (Zalk, 1996) Social scientific research demonstrates that sexual harassment is usually endured rather than confronted. (National Council for Research on Women, 1995) Due to common situational constraints, victims of sexual harassment rarely request that the perpetrator stop. (Gutek, 1993) According to Klein and Rowe (1991) 50 % of women do not say or do anything when sexually harassed. A review of ten studies found that only between 10% to 15% of women either reported their harassers or reacted with an assertive response. Less than 10% of women in higher education, public sector jobs or manufacturing reported sexual harassment. (Gruber and Smith, 1991) Fear of retaliation and loss of privacy are the main reasons victims of sexual harassment endure their suffering. (Klein and Rowe, 1991) A study by Sandoff reported that that 95% of women who report sexual harassment suffer retaliation and loss of privacy. (Fogel and Pearlman, 1999) Sandler (1996) has documented the prevalence of sexual harassment on college campuses and its deleterious emotional, physical and educational effects.

Discussion of Questions 1, 2, 3) - According to the Appellate Court, the Lower Court sustained the defendant's demurrer to causes of action under the Bane Act, in essence on the ground that

the Petitioner, Levine, was not discriminated against in the employee/applicant capacity. The Appellate Court found the ruling supported on that same ground. (Appendix B at pages 5,6,18)

The rulings constitute abuse of discretion since the Bane Act clearly states that its protections are for "any person" and does not exclude non-applicant/non-employees of Universities even when the alleged violations are committed on University property. As a graduate student, albeit non-registered, the Petitioner suffered Zelnik's transgressions in a student-teacher relationship, but also as any person and, therefore, was protected by the Bane Act.

Although the Petitioner was in essence an employee/applicant in her student-teacher relationship, arguendo, even if she were not technically so, would that mean she was ineligible for these fundamental civil rights protections? There are tens of thousands of graduate students, many of whom have at one time or other fallen into the category of "non-registered graduate student". As a public policy issue of utmost importance, when members of this large group enter a University campus anywhere in California, which they constantly do at a high rate, do they forfeit their basic civil rights protection under the Bane Act which carries with it rights secured by the United States Constitution? For members of this large present and future group, when they enter a University campus, its offices, and other facilities, are they entering a barren legal wasteland, devoid of Constitutional and other civil rights?

In this case the pattern and practice of sexual harassment, unpaid academic labor for Zelnik under threat and coercion, physical assault and battery continued for more than one dozen years as Zelnik continually promised the Petitioner that if she complied he would eventually grant her re-registration and sign off on her work so that she could complete her Ph. D. degree. He never made good on these promises.

Discussion of Question 4) - Petitioner's allegations of sexual

harassment, threats, intimidation, and physical assaults and batteries were stated in Petitioner's pleadings to the Lower Court and noted by the Appellate Court on p.17 of Appendix B where that Court quoted the following from the pleadings:

" 'In addition to numerous verbal threats against plaintiff, Zelnik also physically assaulted and battered plaintiff on numerous occasions in conjunction with defendant's verbal threats'; those threats were of; 'severe and longlasting adverse repercussions if plaintiff exposed Zelnik's wrongful conduct or personal interest in and relationship with plaintiff to others.'"

Remarkably, the Appellate Court found that the aforementioned acts by Zelnik were not "sufficiently extreme and outrageous to qualify." [for the intentional infliction of emotional distress] (Appendix B, at p.24) In equating the physical assaults and batteries[1] the victim suffered with "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities" Appendix B, at p. 25, the Court opined that sexual harassment in and of itself is not necessarily "extreme and outrageous" behavior."

Such a statement can be seen as setting a potentially dangerous precedent and even permitting some forms of sexual harassment.

Discussion of Question 5) - The Court of Appeal concluded that no authority exists for honest correction of mistaken allegations as justification for contradicting previous erroneous pleadings. In this case the corrections were advanced by the attorney who was hired to replace an attorney who had filed erroneous pleadings. In large part, the reason the Petitioner hired this new attorney was to correct those prior errors for the sake of the case's integrity.

---

[1] At all times herein mentioned the Petitioner is and was a five foot one inch woman who weighs and weighed 85 to 95 lbs. and Zelnik is approximately 6 foot 4 inches tall and weighed approximately 200 lbs. He was literally twice her size.

The public policy implications and impact on the integrity of the judiciary of such a ruling are staggering. Since the Appellate Court used the existence of contradictory pleadings as a reason to dismiss, in effect, it means that in violation of an attorney's ethical duties, that attorney must knowingly assert erroneous allegations or risk case dismissal because of the Defendant's assertion that the now corrected allegations constitute a sham. This contradicts the very essence of a judicial system which aims at honest dealings, including truthful correction of error.

If the Court of Appeal was correct in its conclusion that there exists no authority for honest correction of mistaken allegations as justification for contradicting prior erroneous pleadings, then the Court should take this opportunity establish such authority for the benefit of the bar, the bench and the public at large, a significant portion of which already holds a less-than-favorable impression of the integrity of attorneys and the court system.

REASONS FOR GRANTING THE PETITION

If the California Appellate opinion is allowed to stand tens of thousands of graduate students in California, and especially those who are women, will be deprived of protection from and recourse against sexual harassment, intimidation, and coercion which interfere with rights secured by the United States Constitution and laws.
Sexual harassment will be encouraged through its lack of prosecutability and, in particular, women's rights will be set back many years.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Carol Ann Levine

Carol Ann Levine
Petitioner in Propria Persona
Date:_____

EDITOR'S NOTE

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ENDORSED
FILED
ALAMEDA
COUNTY
Apr 23 1998

RONALD G. OVERHOLT
EXEC. OFF./CLERK
by Neville Griffith

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CAROL ANN LEVINE,
Plaintiff,
vs.
REGENTS OF THE UNIVERSITY OF CALIFORNIA; REGINALD ZELNIK;and DOES 1 through 25, inclusive,
Defendants

Case No.: 757295-3

JUDMENT OF DISMISSAL IN FAVOR OF DEFENDANTS

On March 25, 1998, the Court sustained Defendants' demurrer to the first through the eighth causes of action of Plaintiff's fifth amended complaint (the "Complaint") without leave to amend and the Court sustained Defendants' demurrer to the ninth through eleventh causes of action with ten days' leave to

amend. A copy of the Court's order sustaining Defendants' demurrer is attached and incorporrated as Exhibit A. Given that the Plaintiff failed to file and serwe a sixth amended complaint within the time deadline specified in the Court's order sustaining Defendants' demurrer, Plaintiff's complaint is dismissed with prejudice and judgment is hereby entered in favor of Defendants The Regents of the University of California and Reginald Zelnik and against Plaintiff Carol Ann Levine.

Dated: Apr 23 1998

HENRY E. NEEDHAM, JR.

JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CAROL ANN LEVINE, Plaintiff, vs. REGENTS OF THE UNIVERSITY OF CALIFORNIA; REGINALD ZELNIK;and DOES 1 through 25, inclusive, Defendant	Case No.: 757295-3 ORDER SUSTAINING DEFENDANTS' DEMURRER TO PLAINTIFF'S FIFTH AMENDED COMPLAINT

Defendant's demurrer to Plaintiff's fifth amended complaint came on for hearing on March 25, 1998 at 9:00 a.m. In Department 81 of the above-entitled Court, The Honorable Henry E. Needham, Jr. presiding. Plaintiff and Defendants appeared through their counsel of record, with Plaintiff's counsel appearing telephonically. Good cause appearing, IT IS HEREBY ORDERED as follows:

The general demurrer to the first and fifth causes of action is sustained without leave to amend for failure to state a cause of action under the Unruh Civil Rights Act. The general demurrer to the second, third, and fourth causes of action, on the grounds that Plaintiff was not discriminated against in the employee/applicant capacity, is sustained without leave to amend. The general

demurrer for failure to comply with the Government Tort Claims Act is overruled. See Gov't Code §905.6. The general demurrer to the sixth, seventh and eighth causes of action is sustained without leave to amend on the grounds that: 1) an agent cannot be held liable for breach of contract; and 2)admissions set forth in the third amended complaint contradict the allegations in the fifth amended complaint. The general demurrer to the ninth through eleventh causes of action is sustained with leave to amend to allege inapplicability of the manager's privilege. The general demurrer to the eleventh cause of action, on the grounds that Plaintiff failed to state a cause of action , is overruled. The general demurrer to the first through eleventh causes of action, on the ground that the claims are barred by the applicable statute of limitations, is overruled.

Plaintiff is granted ten days leave to amend. Defendant shall their responsive pleadings within ten days after Plaintiff files and serves her sixth amended complaint. Notice is demed given the date of the hearing.

Dated: March 25, 1998 HENRY E. NEEDHAM, JR.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FILED

Court of Appeal First App Dist
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RON D. BARROW,CLERK
BY_____
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CAROL ANN LEVINE,

Plaintiff and Appellant,

v.

OF CALIFORNIA et al.,
REGENTS OF THE UNIVERSITY

Defendants and Respondents.

A083084

(Alameda County
Super. Ct. No. 757295-3)

Carol Ann Levine (Levine) brought this action against the Regents of the University of California (Regents) and Reginald E. Zelnik (Zelnik), a professor at the Berkeley campus (UC Berkeley), alleging sexual harassment and discrimination, and related causes of action. She appeals from a judgment of dismissal after the superior court sustained a demurer [sic] to her fifth amended complaint. We will affirm the judgment.

BACKGROUND

This was Levine's sixth pleading attempt, and the demurrer was sustained for failure to state facts sufficient to constitute a cause of action (Code Civ. Proc., § 430. 10, subd. (e)). The sufficiency of a complaint naturally depends on the allegations of that pleading, and thus the allegations of a superseded complaint are ordinarily not considered (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 209; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 984.) An exception arises where the superseded complaint contains omitted or inconsistent allegations that are fatal to a cause of action. *(Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383 384; *Rogers v. Bank of America* (1956) 140 Cal.App.2d 228,230.) That exception is argued here, but we will explore that issue separately, on each affected cause of action. For now

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we set out only the allegations of the fifth amended complaint (hereafter the complaint, unless otherwise indicated) but draw occasionally on uncontroversial prior allegations for context and clarity (cf. *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125, Fn. I [other allegations of same complaint clarified an absurd use of plurals]).

The complaint raises 11 causes of action on theories of sexual harassment and discrimination, breach of contract, and tort. All concern a period from 1975 until the filing of the action in 1995, during part of which Levine worked for Zelnik at UC Berkeley and allegedly endured harassment and broken promises of assistance in gaining readmission to a Ph.D. program after taking a medical leave of absence.

Levine's allegations are remarkably vague in many respects, but they state that she began in 1975 as a "student/protegee" of Zelnik, a history professor. Zelnik became her mentor" and faculty advisor starting in 1979, when she was a registered graduate student pursuing a doctorate degree in Russian history. In 1981, at Zelnik's request, Levine took a "medical leave of absence from her graduate program and related assigned graduate student employment to recover from certain medical problems." In the summer of 1982, she tried to "resume her graduate program and to obtain related graduate student employ

mandated by California Civil Code §51.9 and the Fair Employment and Housing
Act. The ruling erroneously narrowed the scope of sexual harassment protection under these statutes. To ensure that an equitable and uniform legal standard is set to enable women to prosecute the perpetrators, of sexual harassment, this Court should consider the case on the merits.

The Court or Appeals held that: the protection of §51.9 extends to only those who art: actually taking classes or are "registered" students. Slip. Op. at 8. This ruling deprives graduate students not registered for classes from the protections of §51.9 If the Court's decision is allowed to stand, there will be nothing to prevent universities from engaging in discriminatory sexual harassment against unregistered graduate students, leaving these women without a legal remedy.

Nature of the Problem

Sexual harassment is about power, not sex. Societal norms lead harasser and victim to accept the exercise. of power within hierarchies,. Harassment becomes more extreme the greater the power difference between victims and the harasser. People who occupy higher status roles are believed to have the right to demand more of those in lower status roles. J.N. Cleveland & M.E. *Karst., Sexual Harassment and Perceptions of Power: An Underarticulated Relationship*, J. Of Vocational Behav. At 42. 49 (1993).

This Power relationship is especially true at the higher-education context, and *the mentor/student* relationship. Generally the harasser/mentor is given *more* credibility than the accuser/ student. "Entwined in this credibility issue[professor is long-standing, respected member of the community v. transient student] is the mentor system typically embodied in educational institutions. An abuse of unequal power can be easily identified between professor, who controls the learning process and the grading procedures, and the student, eager to impress the professor with her intellect. The common professorial defense, well entrenched. in judicial precedent, feeds on this mentor

system: a professor need merely suggest that his student has misinterpreted his innocent behavior that was aimed solely at her educational development. " *Students versus Professors: Combatting Sexual harassment Under Title IX of the Educational Amendments of 1972.* Kimberly A. Mango, Notc, 23 Connecticut Law Review 355-399 (Winter 1991).

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Honorable Ronald George, Chief Justice,
and Honorable Associate Justices
of the California Supreme Court
December 13, 1999
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Students remain in the student/teacher relationship even though they are sexually harassed. Social science research, in addition to information based on our expertise and experience, confirms that most sexual harassment is endured not confronted. National Council for Research on Women, Sexual Harassment, Research & Resources, at 34 (1995). Moreover, most studies have concluded "for a victim of sexual harassment, immediate response is the exception. not the norm." National Council for Research on Women, *Sexual Harassment Research& Resources (1995),* at 32,

On college campuses in particular, teachers have power over their students in a number of ways, including awarding grades, writing recommendations, and often shaping the attitudes of professorial colleagues toward a particular student. Sue Rosenberg Zalk, *Men in the Academy: a Psychological Profile of Harassers,* in Sexual Harassment on College Campuses, (Michele A. *Paludi,* ed., 1996)

Moreover, the emotional, physical and educational harm to students who are sexually harassed, as well as prevalence of sexually harassing conduct is well documented. See e.g. Bernice

(Stats. 1994, ch. 710, § 2, p. 2888), and amended in 1996 (Stats. 1996, ch. 150, § 1, pp. 593-594), it currently provides that [a] person is liable in a cause of action for sexual harassment when the plaintiff proves": (1) a "business, service, or professional relationship between the plaintiff and defendant"; (2) "sexual advances, solicitations, sexual requests, or demands for sexual compliance by the plaintiff that were unwelcome and persistent or severe, continuing after a request by the plaintiff to stop"; (3) "an inability by the plaintiff to easily terminate the relationship without tangible hardship"; and (4) resulting "economic loss or disadvantage or personal Injury.'" The requisite relationship between a plaintiff and defendant may include (§ 51.9, subd. (a)(1)), among others, one with a "Teacher" (id., subd. (a) (1)(E)) or a "relationship that is substantially similar" to those listed (id., subd. (a)(1)(F)).1 When Levine filed her

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1 Section 51.9 currently provides in full: '(a) A person is liable in a cause of action for sexual harassment when the plaintiff proves all of the following elements:

"(1) There is a business, service, or professional relationship between the plaintiff and defendant. Such a relationship may exist between a plaintiff and a person, including. but not limited to, any of the following persons:

original complaint in 1995, subdivision (a)(1)(F) listed the relationship of "Teacher-student," (Stats. 1994, ch. 710, §. 2, p. 2888.)

Defendants offer these grounds in support of the demurrer: (1) section 51.9, as part of the Unruh Civil Rights Act, did not apply because the university is not a "business establishment" (§ 5 1); (2) the act does not apply to a public entity like the university; (3) the university is not a "person" within the meaning of section 51.9.(4) Levine and Zelnik were not in a student teacher or substantially similar relationship. The trial court relied in essence on ground (4), reasoning for this and the FEHA causes of action

that Levine "was not discriminated against in the employee/applicant capacity" We find the ruling supported on that ground and therefore have no need to reach the other three.

"(A) Physician, psychotherapist. or dentist. For purposes of this section, 'psychotherapist' has the same meaning as set forth in paragraph (1) of subdivision (c) of Section 728 of the Business and Professions Code.
"(B) Attorney, holder of a master's degree in social work. real estate agent, real estate appraiser, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, or escrow loan officer.
"(C) Executor, trustee, or administrator.
"(D) Landlord or property manager.
"(E) Teacher.
"(F) A relationship that is substantially similar to any of the above.
"(2) The defendant has made sexual advances.
solicitations, sexual requests, or demands for sexual compliance by the plaintiff that were unwelcome and persistent or severe, continuing after a request by the plaintiff to stop.
"(3) There is an inability by the plaintiff to easily terminate the relationship without tangible hardship.
"The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury as a result of the conduct described in paragraph (2).
"(b) In an action pursuant to this section., damages shall bc awarded as provided by Section 52.
"(c) Nothing in this section shall be construed to limit application of any other remedies provided under the law.
"(d) The complaint and answer under this section shall be verified as provided for in Sections 446 and 447 of the Code of Civil Procedure."

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However, we do rely additionally on the statute of limitations. Defendants raised the limitations period in their demurrer (as to all causes of action), and although the trial court overruled that

part of their motion, we are at liberty to consider it. *(Aubry, supra, 2 Cal.4th at p. 967.)* It is settled that because the gravamen of an action under the Unruh Civil Rights Act is personal injury, the applicable period is one year. (Code Civ. Proc., § 340, subd. (3). *Mitchell v. Sung* (N.D.Cal. 1993) 816 F.Supp. 597,601-602; *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1103, fn. 4.) The three year period for "action[s] upon a liability created by a statute" (Code Civ. Proc., § 338, subd. (a)) does not apply because personal injury actions, while not for these forms of discrimination, did exist at common law, and the four year statute for actions "not hereinbefore provided for" (Code Civ. Proc., § 343) does not apply because an earlier provision (Code Civ. Proc., § 340, subd. (3)) provides for it. (*Mitchell v. Sung, supra,* 816 F.Supp. at pp. 601-602; but see *Indep. Housing Services v. Fillmore* Ctr. (N.D.Cal. 1993) 840 F Supp. 1328, 1360 [action found barred by three year statute, Code Civ. Proc., § 338, subd. (a), without briefing or analysis on common law analogs].)Levine alleges sexual harassment and discrimination "within the meaning of Civil Code sections 51 and 51.9" beginning "in or about 1975" and "continuing until at least March 30, 1995." Her original complaint was filed on September 19, 1995. This leaves a window of less thin six months at the end of the 20 years in which actionable conduct could occur, further limited by the fact that section 51.9 did not take effect until January 1, 1995, and is not retroactive. (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 787-788.) Moving to the relationship, Levine pleads and relies on the existence of a teacher-student or "substantially similar"' relationship (§ 51.9, subds. (a)(1)(E) & (a)(1)(F)), what she characterizes in her pleading as a "student/protegee" or "teacher/mentor" relationship. However, her direct allegations in this regard concern only the start of the 20 year period of alleged harassment: the relationship, she says, arose "[beginning in or about 1975," and Zelnik was her "mentor and faculty advisor beginning in about 1979 when [she] was a graduate student at Berkeley pursuing her doctorate degree." Abolutely nothing more is

alleged as to the time frame of the relationship. and we know from facts pled further on in the complaint that she took a medical leave of absence in 1981 and after the summer of 1982 was denied readmission as a registered graduate student. While Levine is careful to allege that the harassment and' discrimination continued until March 30, 1995, she alleges nothing about how long the relationship lasted. The only reasonable inference from her pleading is that the relationship ended sometime in 1981. In her briefing on appeal, she argues that any distinction between registered and non-registered student status should not matter given the statute's recognition of relationships "substantially similar" to the enumerated ones (§ 51.9, subd. (a)(1)(F)), but this only begs the question, Was there any nonregistered "teacher student" or similar relationship after 1981 " more particularly, from January I through March 30. 1995. when section 51.9 was in effect? There are no allegations to that effect. In fact. in an effort to plead a tolling of the statute during times of the defendant's absence from the state, she alleges upon information and belief' that Zelnik was absent from the state from approximately May of 1993 to approximately September of 1994." This absence especially since it had to be alleged on "information and belief" strongly implies that there was no teacher-student relationship during the 16 months just preceding the 5-plus month period within which actionable conduct had to occur. i.e., mid-September 1994 through March 1995. If such a relationship did resume upon Zelnik's return to California, we presume this would have been pled by the time of Levine"s sixth attempt to state causes of action within the relevant time periods.

All we can reasonably infer, then, is that Levine believes she had a cognizable "'student/protege' or "teacher/mentor" relationship by virtue of the alleged acts that she was a student/job applicant after 1982 and, we can further infer from vague allegations in her contract based causes of action (see part IV, infra), performed some type of' research related work for Zelnik after 1982. We hold that this was not adequate to constitute a protected '"teacher student or "substantially similar relationship under section 51.9. She does not allege that she took classes from Zelnik or did directed or supervised study with him during the

relevant period, or anytime after 1981. The allegations that, as a one-

time faculty advisor, teacher and employer, Zelnik had some influence over whether she could be readmitted as a registered student is not enough. The statute clearly requires an ongoing teacher student relationship during the limitation period. Levine has not alleged she took courses in the department with anyone. let alone Zelnik. after 1981. 2

For the same reasons. we reject Levine's: reliance on the continuing conduct doctrine. "Under this doctrine. a complaint arising under FEHA is timely if any of the discriminatory practices continues into the limitations period'...", [Citations.] Thus, a '". ..'... systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period.' . . :" [Citation.] (*Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341. 349.) Assuming for sake of argument that this FEHA doctrine applies to an Unruh Civil Rights Act claim, we find it inapplicable on the alleged facts. As already explained above, Levine pled that Zelnik's discriminatory and harassing conduct continued through March 1995, but she did not allege that the qualifying relationship did. harassing conduct of the kind alleged here could easily persist after an initial protected relationship has dissolved; we must respect the narrowing relationship context that the Legislature drafted into the protection. Also, we know of no authority that would allow continuing conduct to bring oneself within a statute's effective date. as opposed to its limitations period,

No error or abuse of discretion is shown in the sustaining or the demurrer on the first cause of action without leave to amend. We bear in mind that this being a statutory

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2 Levine states in a footnote that she "alleged that she . continued to study and perform academic research under Zelnik's tutelage and mentoring while continuing her academic pursuits" after her leave of absence, but the lines of the complaint

she cites say no such thing. Rather, they say her "education was very specialized, requiring independent study under the direct tutelage and mentoring"of Zelnik, an evident attempt to plead "inability . . . to easily terminate the relationship without tangible hardship" (§ 51.9, subd. (a)(3)). But if we assume as true for demurrer purposes that she did feel inhibited in ending whatever "relationship" she had then with Zelnik, the problem remains that she does not allege facts showing that that relationship continued to be a protected one under section 51.9,

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cause of action brought against a public entity, particularity of pleading was required. (*Bockrathv. Aldrich Chemical Co.* (1999)21 Cal.4th 71,78;*Lopez v. Southern California Rapid Transit District* (1985) 40 Cal 3d 780, 795.)

II. FEHA

The second, third and fourth causes of action are against both defendants and allege discrimination based on sexual harassment, medical condition and gender, in violation of FEHA. They claim discrimination while Levine was both a graduate student, allegedly a position that "constitutes a training program leading to employment" (see, Gov, Code, § 12940, subds. (a), (c) & (h)(1)), and an applicant "for related employment positions available to graduate students, including non-registered graduate students applying for readmission as registered graduate students.,.." Specifically, "[f]ollowing a period of time in which [she] was a non-registered graduate student, [Levine] repeatedly applied for readmission as a .registered graduate student and for related employment positions available to (her] at UC Berkeley 14 and was "repeatedly told by [Zelnik and others at UC Berkeley] that [she] was considered and remained an applicant for employment at UC Berkeley by virtue of [her] application for readmission and that no formal or separate employment application was necessary other than [her] application for readmission."

In its order, the court sustained the demurrer to these causes of

action on grounds that Levine "was not discriminated against in the employee/applicant capacity ....' Levine assails the ruling, reasoning that the court was confused by misrepresentations of her pleading by opposing counsel or improperly looked beyond her pleading to statements in the opposing papers claiming she was unqualified for graduate level positions and thus erroneously resolved a factual issue on demurrer. Defendants respond that she failed to allege an employment-applicant status, failed to allege she was qualified and, in pleading that jobs were available to both registered and *nonregistered* graduate students, contradicted her prior pleadings, allowing the court to disregard her new allegations as sham pleading. Both parties agree that, under precedent handed down after the ruling, Zelnik cannot be held personally liable under FEHA for any of these alleged discrimina-

tory hiring practices. (*Reno v. Baird* (l 998) 18 Cal. 4th 640, 643. 663; accord *Acuna v. Regents of University of California* (1997) 56 Cal. App. 4th 639,651.)

We reject the notion that denying Levine's application to the graduate program constituted a refusal to select her for a "training program leading to employment" (Gov. Code, § 12940, subds. (a), (c) & (h)(1)), a sweeping proposition that would convert every student applicant into a job seeker under FEHA simply because there is some *potential* to work at a related job while enrolled, The evident intent is to include vocational programs like the "apprenticeship training program" mentioned alternatively in the same sentence in subdivision (h)(1) of the section (see, e.g.. *Best v. California Apprenticeship Council* (1984) 161 Cal.App.3d 626, 634-635), but "training program leading to employment" is an unlikely and oblique way to refer to a university graduate program in history, which is obviously academic rather then vocational in nature. The Legislature presumably would have used more direct language had it meant to include applicants to graduate school. We cannot stretch the existing language that far.

The issue, then. is whether Levine adequately pled an application for a graduate level job, beyond her application for

reinstatement of admission. She evidently did not file any separate or formal application but, she alleges, was repeatedly told that she "was considered and remained an applicant for employment at UC Berkeley by virtue of [her] application for readmission and that no formal or separate employment application was necessary other than [her) application for readmission." We agree with Levine that such matters are factual in nature and thus not usually resolvable on demurrer. Since we must generally accept the truth of the allegations on demurrer (*Moore v. Regents of University of California. supra*, 5 1 Cal.3d at p. 125), a motion for summary judgment would usually be needed to rebut such points (cf *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 151-152 [FEHA plaintiff's qualifications for job)).

However, we presume the trial court knew this (Evid. Code. § 664) and thus, in finding no discrimination "in the employee/applicant capacity," concluded, as defendants

doctrine, such an error in an unpublished decision would provide no basis for review. Plaintiff's assertion that this result will somehow discourage attorneys from engaging in honest practices [id.] is merely alarmist rhetoric. Our lower court judges and justices know the difference between corrective pleading and deceptive pleading. An opinion by this Court on the subject will not add anything to the mix.

C. Plaintiff's Bane Act Claim Raises No Issue Worthy Of Review

Plaintiff premised her Bane Act cause of action [Cal. Civ. Code § 52.1] on an alleged interference with her civil rights of free speech and freedom from harassment and discrimination. The problem was, however, that she had no viable claims for harassment or discrimination to begin with and her "free speech" argument was meritless (if not frivolous).2 The Court of Appeal correctly recognized that this claim was parasitic to plaintiff's other failed claims, and found no basis for permitting plaintiff to proceed, (Opn. at 16; see id. at 15 (noting plaintiff's Bane Act

cause of action incorporated her previous allegations))

2 Plaintiff's free speech theory was essentially that Professor Zelnik violated her freedom of speech because he allegedly threatened her with repercussions if she exposed his purportedly wrongful conduct. (Petn. at 9 n.2) The problem with this theory is that it would transform every threat of repercussions into a constitutional tort actionable under the Bane Act. There is no evidence that the Legislature intended such a broad reading of the statute.

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was superseded with leave of court before a demurrer could be heard) marked the first appearance of the notion that any job she sought was available to her as a "non-registered" graduate student. This contradicted allegations in Levine's third amended complaint.

As defendants. Pointed out in their demurrer to the most recent complaint, this notion of qualification as a "non-registered" student directly contradicted allegations in Levine's third amended complaint. Them she had also alleged being told her application for enrollment would be deemed an applicant for *employment* and that no formal application was needed: however, she also alleged in effectthat her admission to the program was a minimal pre-requisite qualification. She alleged: "Consistent with what she had been told, the University further informed plaintiff by way of letter that: [q] We do not accept applications for teaching assistantships from new applicants (incoming-starting) for admission. Applications for these for these positions are accepted from students who will have *completed at least one year of graduate course work* (at Berkeley) by the time the appointment begins, Students interested in research assistantships (GRAs) should apply directly to individual professors *after registration at Berkeley*. Applications for these positions are accepted from students who will have *completed at least one year of graduate course work* (at Berkeley) by the time the appointment begins. Students interested in research assistantships (GRAs) should apply directly to individual professors *after registration at Berkeley.* Applications for readers will be sent to all students who *are accepted for admission.*" (Italica added) After then stating that she was first denied work as a reader on the assumption that she

would do such work for Zelnik, she alleged that she "applied for a position as a doctoral candidate at UCB, was so *admitted and registered, and became a qualified applicant for employment* at the University in those positions mentioned above [research assistant or teaching assistant] which were related to her chosen academic field." (Italics added.) She went on to allege that she did work "after her formal status became one of non-registered graduate student" and this included "leading advanced graduate student seminar discussions in the absence of the assigned professor" and "completing advanced research assignments, then providing the results of such research to Professor Zelnik and others for their use and benefit..." Zelnik eventually began sexually harassing her and "removed [her] from the pool of graduate student applicants seeking available employ-ment positions at the University by encouraging her to take an unrequired medical of

absence, then reclassifying her as a no-registered graduate student, which on information and belief resulted in her no longer being considered by the University as [a] member of the graduate student pool of applicants of the University."

Thus in her third amended complaint, where she described her employment in detail. Levine had alleged that work was available to her as a non-registered student but that this was work she *got and performed.* The work she was *denied* and about which she claimed discrimination in violation of FEHA was work that *required her to be a registered student.* She confirmed this in her opposition to defendants' demurrer to that complaint by offering for judicial notice a booklet from the university's department of history describing student employment opportunities and qualifications. In particular, the department required "that all GSR [research assistants] be registered," and "that all T.A.s be [teaching assistantships] be registered" in their second year of study.

Levine decries any reliance on the booklet, yet case authority allows a court to consider not only inconsistent prior pleadings. but "exhibits, legal memoranda, and other parts of the

record" available on prior demurrers. (Amid v. Hawthorne Community Medical Group, Inc. (1989) 212 Cal. App. 3d 1387.), Even without the judicially noticed booklet here, the court had discretion to disregard the extremely vague current allegations in favor of the more detailed, and inconsistent. allegations from the third amended complaint--unless, of course, Levine offered a sufficient explanation..

We hold that she did not. Cases have excused inconsistency where, for example, a plaintiff was seriously injured and incapable of disclosing the true facts to his attorneys. (*Jackson v . Pacific Gas & Electric Co.* (1949) 95 Cal.App.2d 204, 212-213.) The excuse offered here, however, was in essence that Levine's prior counsel had been inept and thus never got the facts straight or realized their significance. We are aware of no authority recognizing this as a sufficient explanation. Levine calls it "inherently unfair to 'punish' plaintiff for her current counsel's willingness to conform [the] pleadings to the true facts as he understood them to be by denying plaintiff a fair trial because of plaintiff's prior attorneys' inept interpretation of the underlying events and resulting erroneous or incom-

plete Pleadings" We disagree.. It is not the attorney who is "punished," but the plaintiff, and it would be unconscionable to allow such detailed pleading as appears in Levine's third amended complaint to be swept aside and supplanted by vague allegations that are inconsistent. Levine and her prior counsel obviously worked in depth on the allegations, and she offered no excuse for the suspicious change in facts.

Further, we cannot honor her appellate request to take "judicial notice" that "it is common for graduate students to perform graduate studies and research under the guidance of a professor even though they are not actually "officially registered for academic classes at the time" or that "some students continue their graduate studies (researching and writing their thesis, etc.) for many years without actually being formally 'registered' for or attending scheduled classes."

This is not knowledge so universally known that it is

beyond reasonable dispute (Evid. Code. §§ 451, subd, (f), 452, subd. (g)), and we are cited no authority allowing us to notice these asserted facts from any other source (see generally id., § 450). Nor does our resolution of this question leave any need to decide the propriety of taking judicial notice of the newspaper article, appended to Levine's reply brief and formally opposed by defendants, dealing with current union organizing efforts by graduate students. We do warn however, that judicial notice requires a motion conforming with prescribed appellate practice (Cal. Rules of Court, rule 41 (at)) and that Levine's several requests in this regard are improperly buried in footnotes to her briefing.

III. Bane Act

The fifth cause of action, against both defendants, is for interference with civil rights in violation of section 52.1. Subdivision (a) of that section allows a civil action in the name of the people whenever 'a person or persons, whether or not acting under color law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats. intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States or... this state . . . " Subdivision (b) creates a private civil action for damages and equitable relief by "[a]ny

individual whose exercise or enjoyment of [such] has been "interfered with, or attempted to be interfered with, as described in subdivision (a).. . ."

Enacted in 1997, section 52.1 is part of the Tom Bane Civil Rights Act (Bane Act), which also amended section 51.7 to declare the right of all persons in the state "to be free from, any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color religion. . . . sex," etc. (§51.7. subd. (a)). and created provisions for prosecuting violators criminally (Pen. Code, § 422.6 et seq.). (Stats, 1987. ch. 1277. §§ 1-6, pp. 4544-4548.) The Bane Act is a "hate crimes" statute. The Bane Act is a "hate crimes" statute. (In re M.S. (1995)

l0 Cal App. 4th 698, 717; *Bay Area Rapid Transit. v. Superior Court* (1995) 38 CalApp.4th l41,144; In re *Johnson H.* (1993) 13 Cal. App. 4th 1734,1738.) "The Legislature enacted section 52.1 to stem a tide of hate crimes. [Citation] ... The rights guaranteed in section 51.7 apply against private actors, not just those whose conduct is chargeable to the state, and as long as interference or attempted interference with them is accompanied by threats, intimidation, or coercion, section 52.1 provides remedies for that misconduct..." (*Jones v. Kmart Corp.* (11998) 17 Cal.4th 329. 338) Key aspects are that the actor use actual violence or intimidation by threat of violence against the victim's person or property (*Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal. App 4th 101. 111; *Coon v. Joseph* (1987) 192 CalApp.3d 1269, 1277-1278; *McCalden v. California Library Ass'n* (9th Cir. 1990) 95 5 F.2d 1214, 1221-1222) and that the actor be specifically motivated by the victim's protected characteristic (In re M.S. supra, at p. 716).

Levine incorporated all of her preceding allegations into this cause of action identified, as protected rights Interfered with by Zelnik, her "right of free speech and right to be free of illegal discrimination and harassment, as herein alleged."' For the element of actual or threatened physical violence, absent from her allegations to that point. Levine added "In addition to verbal threats Zelnik also physically assaulted and battered plaintiff on numerous occasions in conjunction with defendant's verbal threats"; those threats were of severe and longlasting adverse repercussions if

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plaintiff exposed Zelnik's wrongful conduct or personal interest in and relationship with plaintiff to others." Evidently anticipating a three year statute of limitations (Code Civ. Proc., § 338, subd. (a) [action upon a liability created by statute]), she alleged that the conduct began on September 19, 1992 (exactly three years before the original complaint), and continued for about four weeks until around October 13 of that year.

The court sustained the demurrer to this and the first causes of action "for failure to state a cause of action under the

Unruh Civil Rights Act. . . ." Levine reads this to mean that the Bane Act was held inapplicable to a public entity, and she argues to the contrary. We have a simpler interpretation, namely, that the fifth cause of action was parasitic to the first (or first several) and that the complaint, having failed to state a cause of action under the Unruh Civil Rights Act (or FEHA), necessarily failed to state a cause of action under the Banes Act.

The ruling is sound. The cause of action claims Bane Act interference with (1) the right "to be free of illegal discrimination and harassment, as herein alleged," meaning as alleged to be violations of the Unruh Civil Rights Act (and, by extension, FEHA), and (2) the "right of free speech," meaning that Zelnik threatened "repercussions" should she tell anyone about the misconduct. We have held that the Unruh Civil Rights Act claim failed for want of a protected relationship (part I *ante*) and that the FEHA claims failed for want of a qualified-job-applicant showing (part II, *ante*). It follows that Levine failed as well to allege Bane Act interference with her right to be free of discriminatory./harassing conduct "as herein alleged...." or any interference with a free speech right to tell about that alleged "interference."

This resolution makes it unnecessary to decide whether, as defendants argue: the conduct alleged does not reasonably come within the sweep of a hate crimes statute; Bane Act references to "person" and "persons" do not include a university; and the only acts pleaded were directed against Levine personally rather than as a member of a protected class, women.

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IV. Contract

The next three causes of action, against Zelnik only, claimed damages for breach of an oral contract (sixth), quantum meruit for breach of an implied contract (seventh) and tortious breach of the covenant of good faith and fair dealing (the implied covenant) arising under the oral contract (eighth). They shared the factual predicate of a breached oral or implied agreement dating from January 1993 under which Zelnik, in exchange for Levine's

"promise to work on certain long term research projects at UC Berkeley in areas associated with [his] own interests and expertise," "promised" to (1) ensure that she was reinstated as a registered graduate student following her medical leave, (2) allow her to complete her education, (3) provide "university employment and/or grants" to assist her and (4) "otherwise support" her "educational and employment goals" when he "became chair of the history department, a member of the graduate student committee, and/or was otherwise in a position to fullfill his promises to plaintiff." Mindful of a two year limitations period (Code Civ. Proc., § 339, subd. 1), Levine alleged breaches occurring on or after September 19, 1993.

The court sustained the demurrer to these three causes of action, without leave to amend, "on the grounds that: (1) an agent cannot be held liable for breach of contract; and (2) admissions set forth in the third amended complaint contradict [those] in the fifth amended complaint." Levine finds the first ground a red herring, claiming she "alleges only an oral agreement with Zelnik in his personal capacity as a principal," not as an agent of the university. On the second ground, she says the court improperly considered "prior unverified allegations," given that her third amended complaint was not verified, and that the inconsistency was "picayunish" in any event. Defendants stress the second ground, noting that allegations of a contractual agreement emerged for the first time in the newest complaint. Alternatively, they argue that the new allegations about an agreement constituted different operative facts than those raised in the earlier complaints and thus that the new contract-related causes of action do not relate back to the time of the original complaint and are time-barred.

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We need not address the, relation-back argument, for we find no abuse of discretion in the court discounting the latest pleading under the sham pleading doctrine. Contrary to Levine's impresssion. the doctrine, though often expressed in terms of verified pleadings actually applies equally to unverified pleadings. (*Reichert v. General Ins. Co.* (1968) 68 Cal. 2d 822, 836; *Hill Trans. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.

App. 2d. 711: *Zappas v. King Williams Press, Inc.* (1970) 10 Cal. App. 3d 768, 775)

Our perspective begins in September 1995. The original complaint charged sexual harassment/discrimination in Levine's efforts to win reinstatement, after her medical leave, and fraud and infliction of emotional distress based on representations by Zelnik that her having thwarted his sexual advances would play no role in her returning to the program. A first amended complaint a year later added wrongful termination, the idea being that Zelnik's refusal to readmit Levine was the functional equivalent of terminating her from employment. After a partial demurrer with leave to amend regarding FEHA employment status, a second amended complaint of February 1997, introduced the notion that Levine was either an employee or a *job applicant*. The nearest the pleading came to alleging a contractual agreement was an allegation that Zelnik promised to "reward" her should she give in to him sexually. The "reward" was not specified.

The third amended complaint was filed in May 1997 after a demurrer to the discrimination causes of action was sustained with leave to allege employee or applicant status under FEHA and wrongful termination of employment. This pleading augmented allegations about the jobs Levine held in the department, allegations we have already explored (part II, *infra*) concerning her qualifications for jobs she sought and/or actually had. It alleged, as before, that Levine was an employee because she did certain research work for Zelnik. It also alleged that during and after the medical leave, Levine was guided and mentored by Zelnik "as her faculty liaison and mentor." and that she "more than satisfactorily performed and completed the educational endeavors required of her by him" However, nothing alluded to any promise by him, or understanding by Levine, that

he would assist her readmission quest because of those efforts. To the contrary, it was alleged that Levine, while a non-registered doctoral candidate, "Performed certain services for the benefit of the University, *which were neither required nor related to her academic goals.* (Italics added.)

Levine's current counsel, Randall L. Wiens, entered the case after prior counsel withdrew pending another demurrer. That demurrer was eventually sustained, this time without leave to amend as to wrongful termination, which Wiens conceded could not be maintained since Levine was not an employee, only a job applicant. Leave to amend was otherwise granted, and Wiens filed a fourth amended complaint in November 1997,which offered four expanded causes of action. Defendants again demurred, and as we have already noted, that demurrer was never heard. Instead Wiens sought leave to file a fifth amended complaint which would expand the causes of action from four to eleven, all assertedly based on the same set of operative facts. Defendants opposed this expansion, on various grounds, but the court ruled, without comment, to allow it.

The fifth amended complaint was filed on January 13,. 1998, two years and four months into the action and raised for the first time the contract-based sixth, seventh and eighth causes of action. Now it was alleged: " *In exchange for plaintiff's promise to work* on certain long term research projects at UC Berkeley in areas associated with [Zelnik's) own interests and expertise, *[Zelnik] promised plaintiff that he would ensure* that [she] was reinstated as a registered graduate student following [her] medical leave of absence, was allowed to complete her education, was provided with university employment and/or grants to assist [her] in the completion of her education. and that he would otherwise support [her] educational' and employment goals when [Zelnik] became chair of the history department, a member of the graduate student committee, and/or was otherwise in a position to fulfill his promises to plaintiff." (Italics added.) Levine allegedly "performed allof her promises" whereas Zelnik failed to assist her, despite becoming department chair and being otherwise able to help.

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This was a startlingly new spin on old facts and. despite Attorney Wiens' representations to the contrary in moving for leave to file the new complaint, Writ, had never been intimated in. any pleading before. Most importantly, it contradicted the prior

allegations. Wiens offered no valid explanation, only a lament that previous counsel had "inartfully pleaded" the matter. The client, Levine, would have known all along had there been an oral contract and no excuse was offered for the apparent sandbagging, The court did not abuse its discretion in crediting the old allegation over the new.

The quantum meruit claim suffered from the same defect. Suddenly there was a quasi-contractual obligation whereas the, work had previously been represented as done without any obligation on her part.

Next, if the sham pleading doctrine barred allegations of an oral, it also barred allegations of a tortious breach of an implied covenant arising under that contract. Also, as defendants correctly observe, the. Law no longer recognizes a tortious breach of the covenant outside the insurance-contract context, "at least in the absence of violation of 'an independent duty arising from principles of tort law' [citation] . . . ." *(Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal. 4th 85, 102) Levine cites no authority for such a duty having arisen on the facts as pleaded here.

V. Tort

The demurrer to Levine's tort causes of action-ninth through eleventh was sustained "with leave to amend to allege inapplicability of the manager's privilege."We acknowledge the parties' debate. About the correctness of this stated ground but since our review tests the correctness of the trial court "s "action" in sustaining the demurrer and "not its reasons" *(Stansfield v Starkey* (1990) 220 Cal. App3d 59. 72). we elect to rely on alternative reasons also briefed by the parties.

Fraud. Levine's ninth cause of action, for fraud. is against Zelnik only. Fraud has been called "the last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings," *(Committee on Children's Television, Inc, v. General Foods Corp.*

supra, 35 Cal. 3d at pp 216-217.) "This means that every element of the Cause of action for fraud must be alleged in full, factually and specifically, and the policy of liberal construction of pleading will not usually be invoked to sustain a pleading that is defective in any material respect. [Citation.]" *(Wilhelm v. Pray, Price, Williams and Russell* (1986) 186 Cal. App.3d 1324, 1331)

The elements of fraud or deceit are: "a representation, usually of fact, which is false, knowledge of its falsity, intent to defraud, and damage resulting from that justifiable reliance. [Citation] (*Stansfield v. Starkey*, supra, 220 Cal.App.3d at p. 73., *Cooper v. Equity Gen, insurance* (1990) 219 Cal App.3d 1252, 1262.) The particularity rule requires pleading, among other things, "'how, when. where, to whom and by what means the representations were tendered'" (*Stansfield v. Starkey, supra.* 220 Cal 3d at P. 73, citation omitted) and "a definite amount of damage" (*Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1268).

Levine's ninth cause of action tried to recast her breach-of-contract facts as fraud. She allegedly took a leave of absence and did work for Zelnik relying on promises of assistance in gaining reinstatement as a registered student, university employment, grants, and other support --promises he secretly intended to keep only if Levine reciprocated his sexual advances. In reliance, Levine refrained from seeking education or work anywhere else, Passed up administrative remedies, and (amazingly) did not discover the fraud until March 1995. As a result, she did uncompensated work, suffered loss of reinstatement and job opportunities, experienced distress and incurred fees, expenses, costs and "special and general damages, all in an amount according to proof."

Lack of specificity in all of this makes it impossible to determine when, over a possible time span of 1982 through 1995, the representations were made, and in what context. It also makes It impossible to tell how Levine's reliance could have been justified. Her claim of damages in "an amount according to proof" also fails the specificity requirement, even if we accept her point that she did not have to state an amount for

punitive damages (Code Civ. Proc.. § 425. 10. Subd. (b)). We therefore agree with Zelnik that the demurrer was sustainable for these defects alone..

Levine claims surprise, saying these defects were not raised below, and she seeks an opportunity to amend. We see no need to allow this. First, she cites no authority that failure to anticipate the specificity requirement of *fraud* merits another chance, especially when she was granted leave to amend and declined to use the opportunity. Moreover, she offers absolutely no facts on appeal that might cure the problem and for that reason, too fails to show an abuse of discretion.

Intentional infliction of emotional distress. The tenth cause of action alleged against both defendants, an intentional infliction of emotional distress. The elements are: "(i) outrageous. conduct by defendant. (ii) an intention by defendant to cause, or reckless disregard of the probability of causing, emotional distress, (iii) severe emotional distress, and (iv) an actual and proximate causal link between the tortious conduct and the emotional distress. [Citation.] The '[c]onduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community,' [Citations*]" (Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 300.)

The tenth cause of action recites, as mere legal conclusions,, each element of the tort, leaving the reader to find pertinent facts, if any, in "the allegations of [Levine's first through ninth] causes of action." which are incorporated by reference. We focus on the "acts" apparently alleged and will agree with defendants that they am not sufficiently extreme and outrageous, to qualify.

To sidestep Judge Needham's reliance on "manager's privilege," Levine disclaims any reliance on legitimate personnel or business decisions. She invokes only the allegations of her first and second causes. of action-- Zelnik's harassing acts- and her allegations of intentional wrongdoing in that regard, as stated in her fraud (ninth) cause of' action. She does not detail or analyze. any of those acts but relies on dictum *in Fisher v. San Diego*

Peninsula Hospital (1989) 214 Cal.App.3d 590,618 (*Fisher*). that "by its very nature, sexual harassment in the work place [in violation of FEHA] is outrageous conduct

as it exceeds all bounds of decency usually tolerated by a decent society." She adds, "Sexual harassment of a student by a teacher is no less outrageous and should not be any more tolerated than workplace sexual harassment."

We find the *Fisher* dictum overbroad. FEHA does prohibit on policy grounds a wide range of acts of sexual harassment or discrimination as offensive and undesirable in the workplace, but the scope of the tort of intentional infliction of emotional distress is far narrower. It is concerned not with merely offensive behavior but behavior that causes severe emotional distress. "Conduct is extreme and outrageous when it ""exceeds all bounds [of decency] usually tolerated by a decent society, [and is] of a nature which is especially calculated to cause, and does cause, mental distress, . . . "" [Citation] Liability 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal. 3d 1092, 1122.) "Generally, conduct will be found to be actionable where the 'recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"' (Citation.]" (*KOVR TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028.) Obviously, not all harassing acts actionable under FEHA rise to that level.

Compounding the broad incorporation of unspecified acts in this case is the statute of limitations, which barred any claim for acts older than one year from the time Levine suffered severe emotional distress from them. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal. App.4th 857, 889; § 340, subd. (3).) Given allegations that the misconduct continued &.until at least March 30, 1995," and her original complaint's filing date of September 19 of that year, it follows that the only actionable conduct had to occur within the six months or so between September 1994 and March 30, 1995. The trial court rejected the statute of limitations

as a basis for demurrer, but the narrow time frame for actionable conduct highlights a crucial deficiency in the pleading.

Levine specified no particular acts of harassment and did not specify which of them occurred during or after September 1994. The acts as described in her first cause of

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action range from [c]omments about [her] body, clothing, and personal appearance" and her "unhappy marriage" and "relationship with her husband" to Zelnik touching or leering at her and requesting that she put out... for him. This kind of conduct allegedly began in 1975 and continued "until at least March 30, 1995." But it was a 20-year span, only six months of which is not time barred, and many of the acts apparently would not qualify as "outrageous" within the meaning of this tort. There was certainly no need to specify the dates, places and circumstances of each incident, but we find it inadequate that Levine did not specify as occurring within the limitations period any particular act which might qualify as outrageous. The demurrer was properly sustained.

One might be able to cure such a defect by amendment, but Levine does not show how she can do this. Moreover, since she declined to utilize the leave to amend granted her in the order sustaining the demurrer, we must assume that her current, deficient pleading is the best she can do. (*Sklar v. Franchise Tax Board, supra.*. 185 Cal.App.3d at pp. 621-622.)

General negligence. For her eleventh and last cause of action, for general negligence, Levine incorporates "by reference" every other allegation in the complaint and alleges in bare conclusions that defendants caused her harm by negligently breaching "a legal duty to conduct themselves in a manner to avoid injuring [her] and/or [her] rights." Yet given that the allegations of the complaint covered a 20 year period and the 1-year statute of limitation rendered only events after September 19, 1994 actionable, this cause of action suffers from the same defect as the tenth. We cannot tell what, if any, conduct was negligent. Again, while this might be cured by amendment, Levine neither shows us how nor used the leave to amend granted her in the order

below.

Levine points out a peculiarity in that the superior court's order both sustains the demurrer with leave to amend (as to "'the ninth through eleventh causes of action") and then, in the next sentence, says "[t]he general demurrer to the eleventh cause of action, on the ground that Plaintiff failed to state a cause of action, is overruled." Levine does not propose what to do about this, but we find the matter moot. If we deemed the order a

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sustaining of the demurrer with leave to amend. then Levine failed to amend and properly suffered a dismissal. If we deem it an overruling, then Levine never sought clarification and. by taking this appeal despite lack of a final judgment, implicitly waived the defect or abandoned the cause of action. Either way, the defect is inconsequential and furnishes no basis for a reversal (Code Civ. Proc, § 475).

DISPOSITION

The judgment is affirmed.

25

"s/:Lambden, J.

We concur:

s/: Kline, P. J.

s/: Ruvolo. J.

A083084 Carol Ann Levine v. Regents of the University of California et al.

26

First Appellate District, Division Two, No. A083084
S083172

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

SUPREME COURT

FILED
DEC 15, 1999

S: Robert Wandruff, Clerk
DEPUTY

CAROL ANN LEVINE, Appellant

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA et al. Respondents

Appellant's petition for review denied

S:/ GEORGE
Chief Justice

UNIVERSITY OF CALIFORNIA, BERKELEY

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO •

SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

BERKELEY, CALIFORNIA 94720

March 16, 1979

DEPARTMENT OF HISTORY

TO: Interlibrary Loan, Doe Library

FROM: R.E. Zelnik

March 16, 1979

TO: Interlibrary Loan, Doe Library

FROM: R.E. Zelnik

This is to certify that Carol Levine has been admitted to the graduate program in the History Department effective Fall 1979. She is now auditing one of my graduate seminars and doing advanced research for her projects next year. Accordingy, I request that she be given interlibrary borrowing privileges necessary for her work.

Thank you,
S:/ R. E. Zelnik
Professor of History

To: Inter Library Loan,
From: R.E. Zelnik

This is to certify that Carol Levine has been admitted to the graduate program in the History Department effective fall 1979. She is now auditing one of my graduate seminars and doing advanced research for her projects for next year. Accordingly, I request that she be given inter-library loan privileges, necessary for her work.

Thank you.

R. E. Zelnik
Prof. of History

Dear Carol -

Glad to learn you are home and doing better. Enclosed is the syllabus, plus a list of reference works. These are for your future use; please don't feel at all obligated to do any reading this quarter or even next. I spoke to Toni and you will definitely get an "I" in Malin's course, which you can remove by completing the paper some day.

Please do not show the enclosed lists to anyone else. Good luck. -

Regina

Richard
UNIVERSITY OF CALIFORNIA
DEPARTMENT OF HISTORY
BERKELEY, CALIFORNIA 94720

HI-01

Mr. Carl Lenz
2121 Laguna
apt. # 33
San Francisco, CA
94115

UNIVERSITY OF CALIFORNIA, BERKELEY
BERKELEY DAVIS IRVINE LOS ANGELES RIVERSIDE
SAN DIEGO SAN FRANCISCO
BARBARA - SANTA CRUZ

DEPARTMENT OF HISTORY

BERKELEY. CALIFORNIA 94720

March 16, 1979

Carol Ann Levine
2121 Laguna #33
San Francisco, CA 94115

The Department of History has recommended to the Dean of the Graduate Division that you be admitted to our graduate program in history for Fall 1979. Assuming that the Graduate Division concurs in our recommendation, you should receive official notice of your acceptance from the Dean within the next few weeks.

In order to plan our graduate program for the Fall quarter, it is imperative that we know as soon as possible whether you intend to enroll in the Fall quarter during the week of September 17. We ask you, therefore, to return the enclosed postcard no later than May 15, 1979. If we do not hear from you we will assume that you are not coming, and we will feel free to offer your place to another candidate.

If, after hearing from the Dean of the Graduate Division, you decide definitely to come to Berkeley, you should make a point of seeing our Graduate Secretary in 3310 Dwinelle Hall on September 17 in order to fill out an address card and graduate record card. You will then be assigned to a Graduate Advisor i n you r f ield of study. During the advising period, the faculty, including Graduate Advisers, will be in their offices to help you plan your program. Since enrollment in all graduate courses

requires the permission of the instructor, you should plan your program with your Graduate Adviser early in the advising period and then contact those professors in whose graduate courses you wish to enroll.

We feel obliged to add that our fellowship support for continuing students is limited. With declining enrollments relatively more such students receive awards, but not all qualified students do. Sutdents [sic] who perform strongly can reasonably expect to have University fellowship support for two years, at most, plus Teaching Assistantship appointments (also limited and competitive) for one or, at most, two years. You have already been advised of, and you have recognized, the continuing depression in employment for historians.

We look forward to having you with us in the fall.

Yours sincerely,

Martin Jay
Chairman
Graduate Admissions Committee

MJ:kr enclosure

(408) 954-4349
SC*
THE UNIVERSITY OF SANTA CLARA CALIFORNIA
95053
SCHOOL OF LAW
ADMISSIONS OFFICE

May 2, 1979

Ms. Carol Ann Levine
2121 Laguna, No. 33
San Francisco,..California 94115

Dear Ms. Levine:

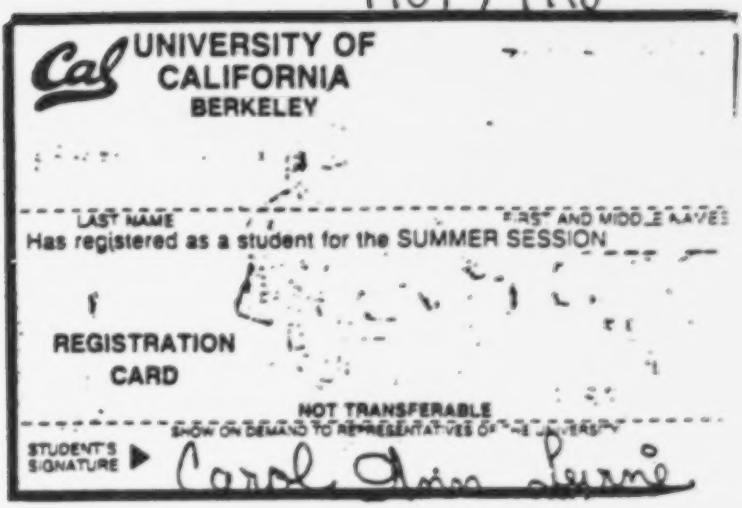
Thank you for your letter of April 24th 1979. I am sorry that you are unable *to* accept our offer of admission to the University of Santa Clara School of Law, however I think that your decision to complete the program leading to the Ph.D. is a wise one. I wish you every success in your pursuit of that goal.

Under our current rules we keep for approximately three years those files of applicants who for one reason or another did not attend the University of Santa Clara. If you reapply for admission within that time period we will be able to reactivate all material from your present application file. We will still require you to file a new application and possibly resubmit all of your academic work to the Law School Data Assembly Service. We do not have any policy permitting deferred admission so you will have to go before the Admissions committee again.

I wish you every success in your future activities,and I look forward to meeting you some time in the future.

Sincerely,
Mary B: Emery
Professor of Law
Director of Admissions
MBE:jb
cc:- Dean George J. Alexander Admissions Office

1989 / 1990


UNIVERSITY OF CALIFORNIA
BERKELEY

LAST NAME FIRST AND MIDDLE NAMES

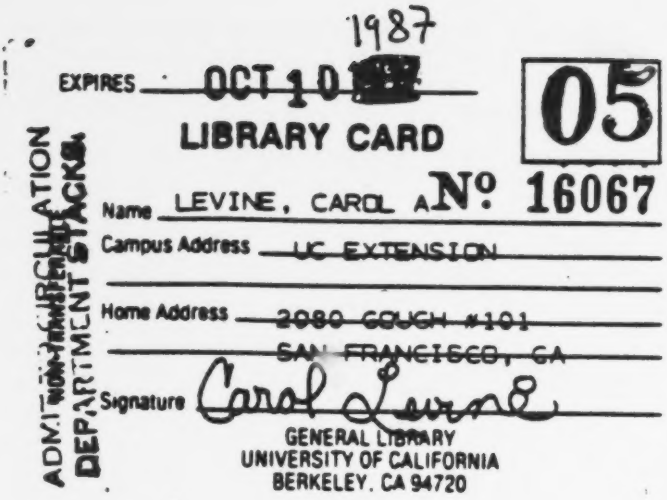
Has registered as a student for the SUMMER SESSION

REGISTRATION CARD

NOT TRANSFERABLE

SHOW ON DEMAND TO REPRESENTATIVES OF THE UNIVERSITY

STUDENT'S SIGNATURE ▶ Carol Ann Peterson



1987

EXPIRES OCT 10 [redacted]

05

LIBRARY CARD

ADMINISTRATION CIRCULATION
DEPARTMENT STACKS

Name LEVINE, CAROL A No. 16067

Campus Address UC EXTENSION

Home Address 2080 GOUGH #101
SAN FRANCISCO, CA

Signature Carol Levine

GENERAL LIBRARY
UNIVERSITY OF CALIFORNIA
BERKELEY, CA 94720

This identification card must be presented when borrowing books from any library unit of the General Library, University of California, Berkeley.

1. Home Use books are subject to recall by another borrower after seven days.

2. In using General Library materials and facilities, the borrower must comply with regulations of the various service units.

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University of California
Berkeley, California 94720 (415) 642-3403

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Privileges Desk
Cecil H. Green Library
Stanford, California 94305 (415) 497-1491

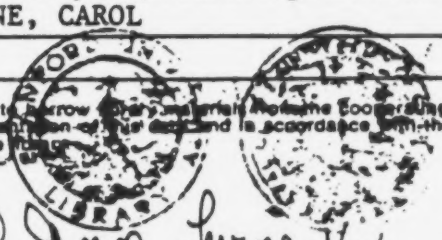
SUL 60

Expires: 9/22/87 Program No: G 10 (Stat.) 146486 (I.D.) ____ (Exp.)

U.C Berkeley/Stanford
Research Library Cooperative Program Borrower's Card

LEVINE, CAROL

is entitled to borrow library materials from the cooperating libraries upon presentation of this card and in accordance with the lending rules of the issuing library.



Carol Ann Levine 1/26/87
Signature of Borrower date

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Cecil H. Green Library
Stanford, California 94305 (415) 497-1491

SUL 600

Expires: ~~1/6/87~~ Program No: G 10 / Stat. ~~155~~ / I.D. ~~186~~ / Exp.

U.C Berkeley/Stanford
Research Library Cooperative Program Borrower's Card

LEVINE, Carol Ann

is entitled to borrow library materials from the cooperating libraries upon presentation of this card in accordance with the lending rules of the LIBRARY

Carol Ann Levine 8/26/86
Signature of Borrower date

Expires: 6/24/86 Program No: G 10 / Stat. — ~~1810~~ I.D. ~~385~~ Exp

U.C Berkeley/Stanford
Research Library Cooperative Program Borrower's Card

LEVINE, CAROL

is entitled to borrow library materials from the cooperating libraries upon presentation of this card and in accordance with the lending rules of the library.

Carol Levine 2/10/86
Signature of Borrower date

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Stanford, California 94305 (415) 497-1491

SUL 600

Expires: 1/6/86 Program No: G 10 1403 185

Stat. I.D. Exp

U.C Berkeley/Stanford
Research Library Cooperative Program Borrower's Card

LEVINE, CAROL

is entitled to ... library materials from the participating libraries upon presentation of ... card and in accordance with the lending rules of the ...

Carol Ann Levine

Signature of Borrower date

This card is not transferable. The user assumes all responsibilities for the proper care and return of all library materials, as well as the payment of fines, fees, and/or repair or replacement costs.

If this card is found, please return to:

Service Desk
General Library
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Berkeley, California 94720 (415) 642-3403

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Privileges Desk
Cecil H. Green Library
Stanford, California 94305 (415) 497-1491

SUL 600

Expires: 9/23/85 Program No. G 10 755 384
Stat. I.D. Exp.

U.C Berkeley/Stanford
Research Library Cooperative Program Borrower's Card

LEVINSON, Carol Ann

is entitled to borrow library materials from the participating libraries upon presentation of this card and to comply with the lending rules of the libraries.

Carol Ann Levinson 7/25/85 JUL 2
Signature of Borrower date

This card is not transferable. The user assumes all responsibilities for the proper care and return of all library materials, as well as the payment of fines, fees, and/or repair or replacement costs.

If this card is found, please return to:

Service Desk
General Library
University of California
Berkeley, California 94720 (415) 642-3403

or

Privileges Desk
Cecil H. Green Library
Stanford, California 94305 (415) 497-1491

SUL 600

Expires: 6/24/85 Program No G 10 Stat. 501 I.D. 384 Exp.

U.C Berkeley/Stanford
Research Library Cooperative Program Borrower's Card

LEVINE, Carol

is entitled to borrow library materials from the cooperating libraries upon presentation of this card and compliance with the lending rules of the libraries.

Signature of Borrower

This card is not transferable. The user assumes all responsibilities for the proper care and return of all library materials, as well as the payment of fines, fees, and/or repair or replacement costs.

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General Library
University of California
Berkeley, California 94720 (415) 642-3403

or

Privileges Desk
Cecil H. Green Library
Stanford, California 94305 (415) 497-1491

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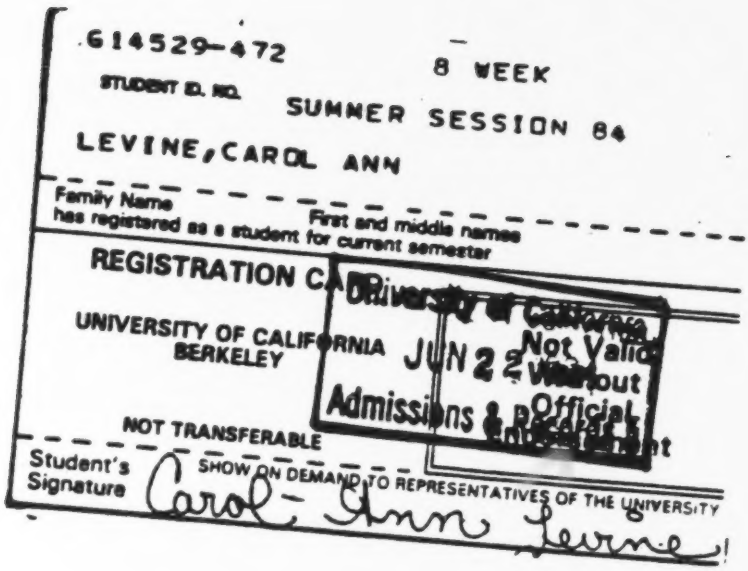
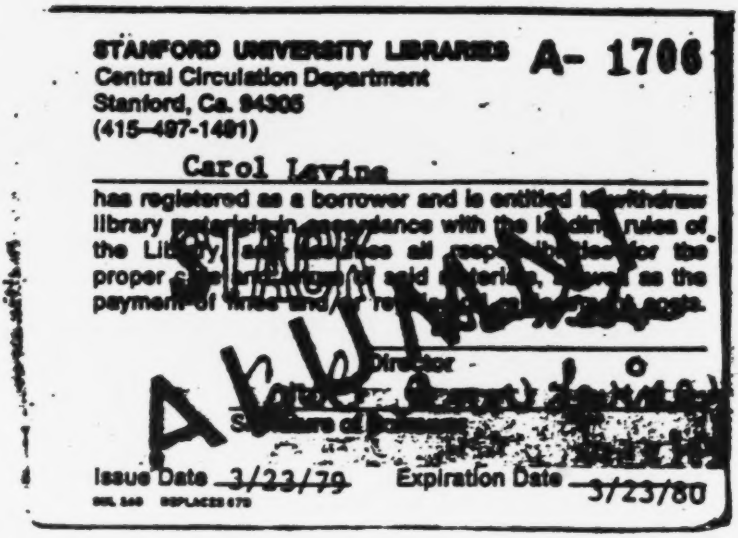

614529-472
STUDENT ID. NO.
8 WEEK
SUMMER SESSION 84
LEVINE, CAROL ANN
Family Name
First and middle names
has registered as a student for current semester
REGISTRATION CARD
UNIVERSITY OF CALIFORNIA
BERKELEY
University of California
JUN 22
Admissions & Records Office
Not Valid Without Official Endorsement
NOT TRANSFERABLE
Student's Signature
Carol Ann Levine
SHOW ON DEMAND TO REPRESENTATIVES OF THE UNIVERSITY

EVENTS 1 2 3 4 5 6 7 8 9 0

A.S.U.C. MEMBERSHIP CARD

I am a registered student of the University of California. I voluntarily accept this A.S.U.C. membership. It is my understanding that this card is for my personal use only and it is subject to forfeiture if presented by any other than myself.

Carol Ann Levine
Signature of Member



STANFORD UNIVERSITY LIBRARIES A- 1706
Central Circulation Department
Stanford, Ca. 94305
(415-497-1481)

Carol Levine

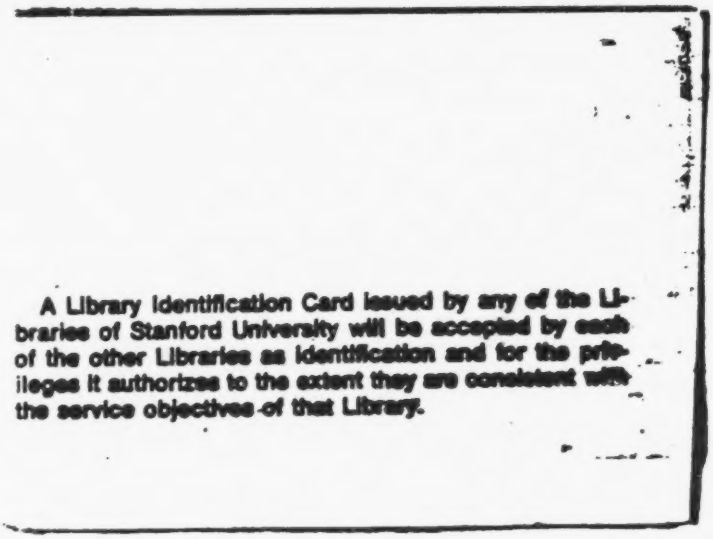
has registered as a borrower and is entitled to withdraw library materials in accordance with the lending rules of the Library, and assumes all responsibility for the proper care and return of said materials, as well as the payment of fines and/or replacement costs.

Director

Signature of Borrower

Issue Date 3/23/79 Expiration Date 3/23/80

DEL 540 REPLACES 670



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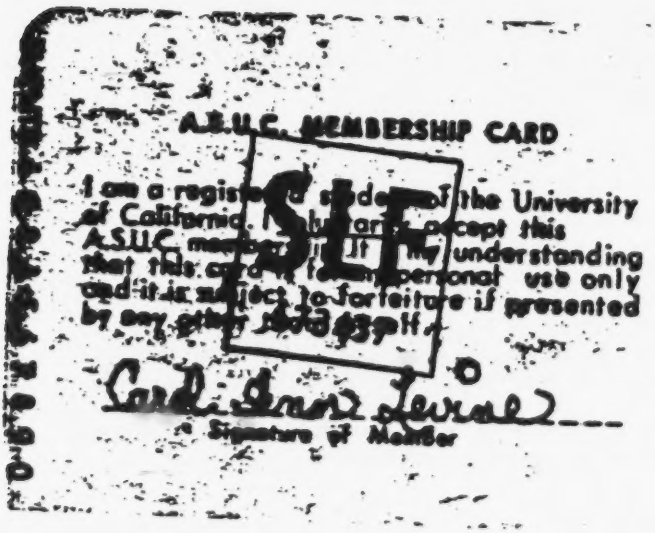
20F 79
SHOW ON DEMAND TO


A.S.U.C. MEMBERSHIP CARD
I am a registered student of the University
of California. I subscribe to accept this
A.S.U.C. membership with the understanding
that this card is for my personal use only
and it is subject to forfeiture if presented
by any other person.
Signature of Member

Dec-14-99 01:16P Cal. ***Women's*** **Law Center 213-637-9909**
P.01

December 13, 1999

By facsimile 415 865-7183 and Federal Express

CALIFORNIA
WOMEN'S
LAW CENTER

Honorable Ronald George, Chief Justice.
and Honorable Associate Justices
of the California Supreme Court
303-2nd Street, SouthTower
San Francisco, CA 94101-1317

Levine v. UC Regents
Supreme Court No. S083172
(Ist App. Dist. No. A083084,
Alameda County Superior Court No. 757295-3)

Dear Chief Justice George and Associate Justices of thc California
Supreme Court:

Pursuant to Rule 14(b) of the California Rules of Court, the California Women's Law Center ("CWLC") submits this letter to urge the Court to grant the petition for review filed November 1999, in the above entitled-action. This letter is also submitted on behalf of Equal RightsAdvocates. California National Organization of *Women. Institute* for Research for Women's Health, and Federation for Professional Women.

The California Women's Law enter is among the nations leading law and policy centers focusing on the comprehensive civil
rights of women and girls. Since its founding in 1989, the Law Center
has served as an advocate in California on issues including sex

discrimination, violence against women, family law, child care and
women's health and reproductive rights. Thc Law Center has been instrumental in shaping public policy regarding the issues of sexual
harassment and sexual discrimination in employment and education.
We have authored numerous amicus briefs, provided education and
Resources to women in California, as well as to the state legislature.
The Law Center is an IOLTA recipient as a state-wide back up center providing assistance to legal services offices and volunteer attorneys statewide in the area of sex discrimination.

3460 Wilshire Blvd., Suite 1102, Los Angeles, California
PH: 213 637 9900 213 637 9909 E-mail:
paula@cwlc.org

Honorable Ronald George, Chief Justice,
and Honorable Associate Justices
of the California Supreme Court
December 13, 1999
Page 2

The petition for review in this case involves issues of critical importance to countless female students in California. The ruling poses a harmful threat to the civil rights of graduate students who are actively involved in their graduate education, yet are not currently enrolled in the University. The ruling strips graduate students who are not enrolled or taking classes of their right to be free from sexual harassment and disrimination as

ment" but, from then through April of 1995, was wrongfully denied the reinstatement and related work. Nevertheless, she at some unspecified point performed "long term research projects at UC Berkeley"' for Zelnik "in areas associated with [his] own interests and expertise . ..." Levine never gave in to his sexual advances, and Zelnik failed to help her regain admission or work. Zelnik's tutelage and support was important to her academic and job success. She refrained from taking action against him until September 1995 concerned about this "position of power and influence" over her. Zelnik had threatened severe and longlasting adverse repercussions" if she exposed his misconduct or interest in her. This caused her a lost opportunity to complete her education, lost employment, and physical and emotional distress.

Levine filed her original complaint in September 1995, and there followed years of demurrers and amended complaints, and two changes of her counsel. In her verified fifth

2

amended complaint, filed in January 1999. Levine asserts causes of action for: (1) sexual harassment in violation of the Unruh Civil Rights Act (Civ. Code, §§ 51, 51.9; all further section references are to that code unless specified otherwise); (2) sexual harassment In violation of the Fair Employment and Housing Act. (FEHA) (Gov. Code, § 12940 eq.). (3) discrimination based on medical condition in violation of FEHA (ibid.) and the Unruh Civil Rights Act (§ 5 1); (4) gender discrimination in violation of FEHA; (5) interference with civil rights in violation of the Bane Act (§ 52. 1); (6) breach of an oral contract. (7) breach of an implied contract (quantum meruit); (8) breach of the implied covenant of good faith and fair dealing; (9) fraud; (10) intentional infliction of emotional distress; and (11) general negligence.

Defendants' demurrer to that complaint came before the Honorable Henry E. Needham, Jr., who on March 25, 1998, heard argument and sustained it on all causes of action, with leave to amend only the ninth, tenth and eleventh, On April 23, after Levine declined to amend, the judge entered a judgment of dismissal.

DISCUSSION

In our review, we give the complaint a reasonable interpretation and treat the demurrer as admitting all material facts properly pleaded. We do not, however. assume the truth of contentions, deductions or conclusions of law. (*Aubry v. Tri-City Hospital Div.* (1"2) 2 Cal. 4th 962, 966-967 (*Aubry*),) We read the complaint as a whole and all its parts in their context (*Moore v. Regents of University of California, supra*, 51 Cal.3d 120, 125), and imply or infer facts from those expressly alleged (*Estate of Lind* (1989) 209 Cal.App.3d 1424,1430; *accord Glaire v. La Lanne Paris Health Spa, Inc*, (1974) 12 Cal.3d 915. 9 13). But on any cause of action where the plaintiff was granted leave to amend and failed to amend, we do not imply or infer facts; instead, we must presume the case has been stated as strongly as possible and resolve all ambiguities and uncertainties against the plaintiff. *(Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616,621-622.) We affirm the judgment if any ground of the demurrer is well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. It is an abuse of

3

discretion to sustain a demurrer without leave to amend if the plaintiff shows a reasonable possibility that any defect identified by the defendant can be cured by amendment (*Aubry supra*. 2 Cal 4th ch. 150 § 1, pp, 970-971). and the burden is squarely with the plaintiff to make that showing (*Blank v. Kirwan* (1985) 39 Cal. 3d 311, 3180..

We independently review whether a cause of action has been stated (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146); we deferentially review, for abuse of discretion, whether leave to amend should have been granted (*Aubry*, supra 2 Cal 4th at pp. 970-971; *Goodman v. Kennedv* (1976) 18 Cal.3d 335, 349; *Lazar* v. *Hertz Corp.* (1999) 69 Cal App. 4th 1494.1501).

I. Unruh Civil Rights Act

The first cause of action is against both defendants and claims sexual harassment in violation of section 51.9. Enacted in 1994

R. Sandler, *The Chilly Classroom Climate: A Guide to Improve the Education of Women,* 15-17,19, National Association for Women in Education (1996)(sexually offensive hostile environments may reduce female student's class participation and even cause women to drop out of classes entirely.)

Another reality related to sexual harassment is that "real victims' rarely tell the harasser to stop. They are often inhibited or constrained from doing so by the situation . . or by their upbringing." Barbara A. Gutek, *Responses in Sexual Harassment in Gender Issues in Contemporary Society,, at 197, 205 (1993). 50%* of women respond *to harassment by doing and* saying nothing, F, Klein &- *M. Rowe., Estimating the Cost of Sexual harassment to the Fortune 500 Service and Manufacturing Firms,* Testimony on H.R.I. before the Housc of Representatives Committee on Education and Labor, 102nd Cong. 1st Sess. 169, 209 (1991) A review of ten studies found that only 10% to 15% of women either responded assertively to or reported their harasser. Less than *10% of women in public sector* jobs. manufacturing, or higher education reported the harassment. J.L. Gruber & M, D. *Smith, Women's Response to Sexual Harassment: A Multivariate Analysis,* Basic & Applied Psychology. at 544-45 (1991) (emphasis added).

The reluctance of most sexual harassment victims to take stand against their harasser's abuse is grounded in fear of both retaliation and loss of privacy. F. Klein & M. Rowe, *Estimating the Cost of Sexual harassment to the Fortune 500 Service and Manufacturing Firms,* Testimony on H.R. I. *supra.* at 172. One study reported that 95% of women who

Report sexual harassment fear retaliation and loss of privacy. Ronni Sandoff, Sexual *Harassment in the Fortune 500* Working Women at 69, 71. *Thus, when* women do come forward, the system must not place unnecessary impediments to prosecuting their claims.

Unregistered Graduate Student Status

This is a genuine status that is representative of the learning experience of graduate students in California colleges and universities. The University of California has an explicit category of library user "Unregistered Graduate Student," An informal survey of graduate student associations reflect that students are not registered during the summer or for longer periods of time while researching and writing dissertations. If the Court of Appeals decision is allowed to stand women who are experiencing sexual harassment will not have remedy, and the harm will go unchecked.

For all the above-mentioned reasons, we respectfully request that the Supreme Court grant the petition for reviciw,

Very truly yours,

Susan Berke Fogel
Legal Director

Paula D. Pearlman
Supervising Attorney

CV: Randall L. Weins (Artorney for the Plaintiff and Petitioner)
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Dec-14-99'01:17P Cal. Women's Law Center **213 637 9909**
P.05

PROOF OF SERVICE

STATE OF CALIFORNA, COUNTY O FLOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action. *My* business address is 3460 Wilshire Blvd., Suite 1102, Los Angeles, California 90010.

On December 13,1999, I served the foregoing document described as **LETTER OF SUPPORT FOR GRANTING PETITION FOR REVIEW IN THE MATTER OF LEVINE v. REGENTS Supreme Court No. SO83172 (1st App. Dist. No. A083084, Alameda County Superior Court No. 757295-3)** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Honorable Henry E. Needham, Jr.
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I caused such envelopes to he deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid.

Executed on December 13, 1999 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct,

S:/----------
Paula D. Pearlman

Dec 14-99 01:18 Cal. Women's Law Center 213 637 9909

CALIFORNIA WOMEN'S LAW CENTER
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Fax No 510/595 7856 Date 12/14/99
To: Carol Levine From: Paula Pearlman

Total number of pages (including cover page) 6

Ifyou do not receive all the pages please call 213 637 9900 Ext. 207

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Supreme Court, U.S.
FILED
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(3)

No. 99-1840

In The
Supreme Court of the United States

CAROL ANN LEVINE,
PETITIONER,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari
To The California Court of Appeal
For the First Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the California Court of Appeal's unpublished decision correctly affirmed the trial court's judgment dismissing Petitioner's fifth amended complaint after sustaining Respondents' demurrer, where Petitioner:

(1) improperly attempted to plead around prior inconsistent allegations;

(2) alleged only vague claims of sexual harassment that purportedly spanned twenty years, and the applicable statute of limitations limited recovery to only the end of this period; and

(3) failed to allege facts that could give rise to any actionable professional relationship during the relevant period, where California law requires the existence of such a relationship as a predicate to liability under Petitioner's various legal theories.

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PRELIMINARY STATEMENT

This Court exercises discretion to grant a petition for certiorari only when motivated by "special and important reasons." S. Ct. R. 10.1. No such reasons exist here.

Petitioner Carol Ann Levine hyperbolically asserts that the unpublished decision of the California Court of Appeal, First Appellate District, Division Two sets a "dangerous precedent" that encourages sexual harassment and impairs women's rights in the university setting. But apart from correctly resolving the parties' dispute, that decision does not unsettle or create any conflict of law, does not raise any constitutional concerns, and is of no interest to anyone except the parties involved.

Indeed, this unpublished court of appeal decision – like all such unpublished decisions – has no bearing on future cases or the development of the law – and is not even citable precedent outside the confines of this dispute. *See* Cal. R. Ct. 977(a). Moreover, the lower courts fully considered and correctly decided all issues below, properly applying California law to the record and finding Petitioner's fifth amended complaint lacking any arguable theory on which she could or should proceed. Respondents respectfully request that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondents caution the Court not to rely on Petitioner's unsupported background statement [Pet. 3-5] in evaluating her claims because Petitioner (a non-attorney who has filed the petition in pro per) offers a factual story that strays far beyond the established record. Indeed, the only record citations in her statement of facts refer to Petitioner's Appendices D and E. These Appendices consist entirely of materials never presented to any court below. Respondents thus ask this Court to look to the Court of Appeal's focused recitation of the facts and procedural history [App. B at 2-3] as its guide in evaluating the petition rather than to Petitioner's unsupported factual statement.

Briefly stated, Petitioner alleges that while she was a student at the Berkeley campus of the University of California, a University history professor sexually harassed her beginning sometime in the mid-1970's until the end of March 1995. But several factors make Petitioner's case unusual, not the least of which was that during most of this 20-year period – including the only years not barred by the applicable statute of limitations – she was not a registered student, not a University employee, and not an applicant for University employment. Her failure to establish membership in at least one of these categories doomed her claims as a matter of California law.

Indeed, Petitioner tried unsuccessfully – six times – to state a viable cause of action in the Alameda County Superior Court. But, as the Court of Appeal found, her final operative complaint was "remarkably vague" and suffered from a variety of defects, including the inclusion of allegations that were inconsistent with her prior pleadings. (App. B at 2) After repeatedly sustaining demurrers and giving Petitioner an opportunity to amend, the trial court sustained the University's last demurrer – without leave to amend as to most of Petitioner's claims, and with leave to amend as to the remainder. When Petitioner refused to amend, the trial court dismissed her lawsuit and entered a judgment in Respondents' favor. The Court of Appeal affirmed and the California Supreme Court declined to grant review.

REASONS THE PETITION SHOULD BE DENIED

A. Petitioner Cannot Transform Her State-Based Statutory Sexual Harassment Claim Into An Action For A Violation Of Her Constitutional Rights

Despite six attempts, Petitioner could not plead the necessary allegations for a viable lawsuit. When her claims for sexual harassment under California's civil rights and fair employment statutes failed, she tried to assert the same claims in different ways – expanding her final operative complaint to eleven causes of action – including recourse to an inapplicable California "hate

crimes" statute that is designed to protect constitutional rights.

Petitioner continues that approach here, trying to attract this Court's attention by arguing that the Court of Appeal has robbed all University students of their constitutional rights. But the Court of Appeal has done no such thing. Its decision merely focuses on the unique allegations and inconsistencies in *Petitioner's* various complaints and, finding them lacking any basis on which a claim can be stated, upholds the dismissal of Petitioner's lawsuit in an unpublished opinion. The decision thus has no broad application to students or other individuals who make claims of sexual harassment in the educational setting. Nor does the decision prevent students from invoking any of California's laws designed to prevent and redress sexual harassment. Petitioner's inability to adequately plead a case simply says nothing about such claims in general.

B. California's Bane Act Has No Application To Petitioner's Sexual Harassment Allegations

Petitioner argues that the Court of Appeal erred in denying her protection under California's Tom Bane Civil Rights Act, California Civil Code section 52.1. Petitioner is wrong because the Bane Act does not afford her any protection for the alleged wrongs Respondents purportedly committed against her.

California's Bane Act is a hate crime statute designed to protect against civil rights violations in that context. *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 338 (1995); *BART Dist. v. Superior Ct.*, 38 Cal. App. 4th 141, 144 (1995). Hate crime statutes "proscribe an especially egregious type of conduct – that of selecting crime victims on the basis of race, color, religion, ancestry, national origin or sexual orientation." *In re Joshua H.*, 13 Cal. App. 4th 1734, 1739 (1993).

Although the Bane Act appears to impose liability on any individual for interfering with any other individual's civil rights by threat or intimidation, California courts have construed the Act narrowly in light of its "specialized purpose" of deterring hate crimes. *See* Gail Donoghue & Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 552-53 (1998). Under this construction, the courts read the statute in conjunction with related statues and require a plaintiff to plead and prove "a specific intent to deprive a person of a defined constitutional or statutory 'right' on account of the person's status as a member of a protected class." *Joshua H.*, 13 Cal. App. 4th at 1741; *In re M.S.*, 10 Cal. 4th 698, 713 n.5 (1995); *Boccato v. City of Hermosa Beach*, 29 Cal. App. 4th 1797, 1809 (1994).

Here, Petitioner argues that alleged sexual harassment by a University professor interfered with her right to free speech and right to freedom from harassment. The free speech claim arises from her

allegation that the professor threatened her with adverse repercussions if she exposed the alleged harassment. (Pet. i, 2) Thus, under her theory, any pressure not to "tell on someone" becomes a constitutional violation that can be remedied under a hate crime statute like California Civil Code section 52.1.

Petitioner's Bane Act allegation had numerous problems. But her allegations did not fit the hate crime profile that typically involves prejudice-based violence on innocent strangers. *Joshua H.,* 13 Cal. App. 4th at 1749 n.9. Her case was not about an impersonal attack motivated by prejudice. Rather, she alleged one-on-one contact with a University professor who purportedly shared a close working relationship with Petitioner and an "interference" with her rights that arose from a *personal* bias against her – not because she happened to be a woman. Petitioner's inability to connect the alleged harassment to her membership in a protected group doomed her Bane Act claim, as the Court of Appeal held.

The Court of Appeal's unpublished decision in Petitioner's case does not deprive University students or any other Californian of the Bane Act's protections. Nor does it violate Petitioner's federal constitutional rights. It simply held that the Bane Act had no place in Petitioner's sexual harassment lawsuit. That holding raises no issue worthy of national review.

C. The Court Of Appeal's Dismissal Of Petitioner's Emotional Distress Claim Raises No Issue Worthy Of Review

In addition to claiming that sexual harassment automatically qualifies as a hate crime under California's Bane Act, Petitioner asserts that such harassment automatically qualifies as common law intentional infliction of emotional distress (IIED). She argues that the trial court erroneously dismissed her IIED claim because, as a matter of California law, her sexual harassment allegations necessarily sufficed to state a viable claim under that cause of action. (Pet. 7)

But the Court of Appeal never undertook such an analysis. Instead, it noted merely that her complaint never specified what allegedly "outrageous" acts occurred within the narrow six-month period during which actionable intentional infliction purportedly occurred (*i.e.*, from September 1994, the earliest non-time-barred acts would be actionable, to March 1995, when her relationship with the University professor ended). (App. B at 26) Moreover, Petitioner has no legal support for her assertion that sexual harassment suits necessarily encompass IIED. To the contrary, while California's sexual harassment law extends to a wide variety of offensive acts, California narrowly limits IIED actions to outrageous conduct that causes severe emotional distress. (*Id.*) Thus, while a given act *may* constitute both harassment and IIED, that is not always

the case. In other words, California law does not require absolute congruence between these two causes of action.

In any event, how California defines its common law- and statutory-based torts is not properly a matter for this Court's attention. 28 U.S.C. § 1257(a). That alone is grounds for denying the petition.

D. The Court Of Appeal's Application Of California's "Sham Pleading" Doctrine Raises No Issue Worthy Of Review

Finally, Petitioner objects to the way the trial court and Court of Appeal applied California's "sham pleading doctrine" to her complaint. The lower courts noted how her fifth amended complaint contained new factual allegations that contradicted her earlier amended complaints; it was on that basis that the courts discounted her latest pleading. (App. B at 19-20)

Petitioner argues that the Court of Appeal erred in failing to permit her to correct mistaken allegations in her previous pleadings. (Pet. 7-8) But to the extent that her prior allegations were inconsistent with her operative complaint, she had to account for that discrepancy in the trial court (and to explain to the Court of Appeal why that discrepancy warranted a reversal). She failed to do so. (App. B at 21-22) Instead, in her last (and operative complaint), she carefully pled around defects rather than correcting the errors in her previous complaints, omitting

significant factual detail that was present in her previous (and superseded) pleadings.

The clearest explanation for her "suspicious change in facts" was an attempt to supplant previous detailed pleadings with vague allegations to avoid fatal pleading deficiencies. (App. B at 15) For example, her last complaint alleged an eligibility for University employment, even though her earlier allegations made clear that her unregistered status meant that she was not qualified for such employment [*id.* at 13]; she attempted to add new facts to support new causes of action [*id.* at 21-22]; and she failed to provide the specific allegations necessary for fraud and other new claims [*id.* at 23]. Both the trial court and the Court of Appeal properly called Petitioner on her "sandbagging" tactics. (*Id.* at 22)

None of Petitioner's alarmist rhetoric implicates this Court's review of that analysis. Indeed, this issue is simply a matter of state law and state pleading rules, not properly a subject of Supreme Court review.

CONCLUSION

The California Court of Appeal correctly rejected Petitioner's claims that she be permitted to continue her lawsuit. Its unpublished decision neither addresses nor involves any substantial questions of law, nor does it resolve any important issues that require review by this Court. No aspect of this case is noteworthy and its facts

and procedural posture are so unusual that no other court is likely to face a similar situation.

In sum, this is and was a simple case of faulty pleading on a record that fails to sustain any alleged invasions of Petitioner's constitutional rights. Its very uniqueness should preclude review. The parties and judicial system already have invested far more resources examining this matter than should ever have been incurred. The Court should therefore deny Petitioner's petition for a writ of certiorari.

Dated: June 16, 2000.

Respectfully submitted,

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Appendix[1]

had argued, that the sham pleading doctrine allowed the court to disregard allegations of a denied application for a job for which Levine was qualified.

In ruling, the court was not confined to the allegations of the verified fifth amended complaint. It "was entitled to consider the verified allegations of the earlier complaint[s]. [Citations.] Allegations of fact made under oath may not ordinarily be dropped without adequate explanation merely for the purpose of avoiding their harmful effect in a subsequent pleading. [Citations.]" (*Sackett* v. *Wyatt* (1973) 32 Cal.App.3d 592, 597.) The rule applies where a party has "file[d] an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If [s]he fails to do so the court may disregard the inconsistent allegations and read into the

[1] Petitioner's Appendix B at pages 12-13 (between center headings "10" and "11") is missing a page from the unpublished decision of California Court of Appeal, and instead erroneously includes a page from Respondent's Answer to Petitioner's petition for review by the California Supreme Court. This Appendix supplies the Court with that missing page.

amended complaint the allegations of the superseded complaint. [Citations.]" (*Owens* v. *Kings Supermarket, supra,* 198 Cal.App.3d 379, 384.)

Part of Levine's burden under the FEHA was to plead that she applied for and was denied a job *for which she was qualified.* (*Levy* v. *Regents of University of California* (1988) 199 Cal.App.3d 1334, 1343; *Ibarbia* v. *Regents of University of California* (1987) 191 Cal.App.3d 1318, 1327.) In her latest complaint, she alleged, albeit in conclusory language without specifying any particular job, that in addition to being an applicant for readmission as a registered graduate student, she was "an applicant for related employment positions available to graduate students, including non-registered graduate students, at UC Berkeley." Her need to be qualified as a "non-registered" student was crucial because her pleading also indicated that she lost her "registered" status and, beginning in the summer of 1982, began applying for "readmission as a registered graduate student. . . ."

Levine had been trying to allege discriminatory hiring under FEHA since her original complaint, but her current complaint (a short-lived fourth amended complaint

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No. 99-1840

In The

Supreme Court of the United States

Carol Ann Levine

Petitioner

v.

Regents of the University of California and Reginald Zelnik

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California

REPLY BRIEF FOR THE PETITIONER

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12 pp

Petitioner asks the Court's indulgence as she is pro se and per Haines v. Kerner 404 U.S. 519, 592 S. Ct. 594, 30 L. Ed.2 652 (1972) subject to less stringent pleading standards.

As will be demonstrated below this case involves conflict of law and Constitutional issues warranting Court action. Contrary to the Respondent's (Resp.) statement at page 1, the case is of great interest to a great many persons. E.g., Appendix F of the writ is an amicus letter submitted by the California Women's Law Center on behalf of Equal Rights Advocates, California National Organization for Women, Institute for Research for Women's Health, and Federation for Professional Women. The American Association of University Women also wrote an amicus letter to the appeal court. These organizations have a combined membership of about 800,000 people. Additionally, on behalf of each University of California (UC) campus graduate student assembly, the head of UC's United Graduate Student Assemblies repeatedly notified Petitioner (Pet.) that the assemblies believe the issue very relevant to the welfare of the 36,740 UC graduate students (statistics for academic year 1999-2000 Office of the President of UC, 6/22/00) and the hundreds of thousands and millions to follow. They have asked to be kept abreast. UC campuses currently, have more than 163,000 students, including 126,000 undergraduates, History has shown many of these can be expected to continue at UC graduate schools.

It is perhaps ironic that Resp., who accuses Pet. of "sandbagging" (although, Pet. was spoken for by attorneys in prior pleadings), next appears to try to deceive the Court. Resp. conveniently states "Indeed, this unpublished court of

appeal decision – like all such unpublished decisions - has no bearing on future cases or the development of law – and is not even citable precedent outside the confines of this dispute. See Cal. R. Ct. 977(a)."

Although, well within the allowable page limits, and realizing that it is a state statute that the Court may not be readily familiar with, Resp. conveniently fails to quote California Rule of Court 977(a) verbatim, or represent it in its entire context. That rule follows:

> "**Rule 977. Citation of Opinions**
> (a) **[Unpublished opinions]** An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding **except as provided in subdivision (b).** [emphasis added]
> (b) **[Exceptions]** Such an opinion may be cited or relied on:
> (1) when the opinion is relevant under the doctrine of law of the case, res judicata, or collateral estoppel; or
> (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding."

Thus, under Cal. R. Ct 977(a) and (b), Resp. can use this case to counter similar future complaints, which is obviously

in its favor. Conversely, a complainant will have no knowledge of it. Potentially this could further add to the already existent substantial obstacles to victims reporting sexual harassment transgressions by those with power over them in academia. (See Pet. App. F pages 3-6: pages F3, F4 were accidentally transposed with App. B, pages B3, B4.) Thus, contrary to the Resp.'s deceptive representation, it has avail to the appellate decision "outside the confines of this case." The upshot is that this decision will be used by Resp. to repress and to defend complaints. Yet it has the audacity to state and argue that this case has no impact on future cases. Conversely, bona fide plaintiffs cannot use the case.

In re Cal R Ct 977(a),(b) there is also another potentially disturbing aspect to the appellate court's tactic of not publishing this case. One apparent motive seems to have been to limit the class of potential litigants covered by California Govt Code 12940 (a)(c) and (h)(1). Unpublished decisions insulate a court's opinion from scrutiny.

In App. B at pages 5,6 the appeal court said it supported the lower court ruling of no valid causes of action for violation of the Unruh Act and FEHA because the Petitioner was "not discriminated against in the employee/applicant capacity".

At App. B, page 11 the appeal court writes:

> "We reject the notion that denying Levine's application to the graduate program constituted a refusal to select her for a 'training program leading to employment' (Govt Code, § 12940) subds (a), (c) & (h)(1), a sweeping proposition that would convert

> every student applicant into job seeker under FEHA simply because there is some potential to work at a related job while enrolled.

The appeal court continues by saying that such protection is for vocational not academic program attendees, but disregarded the fact that Pet. was in a conjoint law-history program with Boalt Law School, obviously for future employment. The law program was first contingent upon completing the Dept of History program.

At App. B, page 18, abusing discretion, and applying flawed reasoning, the appeal court writes:

> "We Have a simpler interpretation, namely that the fifth cause of action [complaint of Bane Law violation] was parasitic to the first (or first several) and that the complaint having failed to state a cause of action under the Unruh Civil Act (or FEHA), [because of what the appeal and lower court both termed as absence of employee/applicant status] necessarily failed to state a cause of action under the Banes [sic] Act."

Other than belonging to the genus Homo Sapien, no other qualification is necessary for Bane Act protection and its guarantee of rights under the US Constitution and US laws. Employee/applicant status is irrelevant.

It is disturbing that an issue like this, which the appeal court admits contains a "sweeping proposition", and

which potentially affects hundreds of thousands and future millions, is concealed from ample public attention through non-publication. It is dangerous precedent to allow a court to use such tactics, the result of which are in essence to conceal its own "sweeping" actiòns from the view of the large body of persons whom such an issue potentially directly affects and the even larger body, who are interested in such civil rights matters. The widespread effect plus XIV and I Amendment issues beckon US Supreme Court review.

Respondent at page 2 misstates the Pet.'s allegation as it appears in the Pet., at page 3. Resp. characterizes the period of sexual harassment as 20 years, beginning in the mid-1970s, whereas Pet. clearly states that sexual harassment, threats, intimidation, long term coerced unpaid labor, plagiarism, physical assaults and batteries did not begin until after 1981, well past then.

Regarding the statement of the case, contrary to Resp.'s assertion, Pet.'s background statement is a true, factual account. The appeal court's background account is inaccurate and slanted, based in large part on distorted representations of the Resp.'s pleadings. E.g., Resp. conveniently fails to properly represent the Pet.'s unregistered status in its true context.

As is explained in the Pet.'s writ at page 3, non-registered graduate student is a commonly accepted status, often employed by professors to save their students registration fees in what are often long, drawn out graduate coursework and dissertation research. (20 years or more to complete a Ph. D. degree is not unheard of or even

considered so unusual, especially for a joint degree.) "Non-registered graduate student" is an official category as noted in Appendix E, (especially at page 1 of the lodged exhibits in Appendix E, an official UC library category publication). Further support of this status is discussed at page 6 in App. F, the amicus letter representing about 800,000 persons in many state and nationwide civil rights organizations.

Furthermore, since the alleged offending professor coerced Pet. to conduct his own work (albeit unpaid and under coercion, which is analogous to the equivalent of slave labor in academia), Pet. was in a real, although unofficial, sense, a University employee. Then, Resp. at pages 2-4, presents history irrelevant to the issue, by arguing for denial of the writ, based on its representations of how Pet.'s former different and unassociated law firms presented Pet.'s State case inconsistently. Resp. mentions one attorney's failure to amend, which did occur, but over Pet.'s objection.

Respondent's reasons A. and B. why the petition should be denied are totally irrelevant to the instant issue as are the details therein presented. Resp.'s characterization of "unique allegations and inconsistencies in Petitioner's various complaints" are misconceived, and also irrelevant.

Arguendo, were the Defense's "specialized purposes" correct, per *Joshua* the alleged offending professor still specifically intended to deprive Pet. of her defined Constitutional right because she was a member of a protected class per *Bocatto*. (In re *Joshua H.* 13 Cal. App.4th 1741, (1993); . *Bocatto v. City of Hermosa Beach* 29 Cal. App.4th 1797, (1994)). I.e. Pet.'s rights were violated both under

California Civil Code (CCP) 52.1, the Bane Act and, because she was a victim of reprisal in relation to a labor dispute, under CCP 51.7, (which the Resp. controversially contends is a necessary pre-requisite for Bane Act hate crime protection). Pet. accused Zelnik of retaliating against her for exposing his role in the plagiarism of her work and exposing his intimidating, threatening and coercing practices, whereby he extracted years of unpaid labor from her for his own purposes. The other cases Resp. cites do not appear to restrict Bane Act protection to hate crimes.

Resp. does not consider that behavior and statements by the alleged offending professor indicate disdain and hate for women in general. There is a well-known, large body of literature indicating sexual harassment is an act of power and intimidation, rather than being purely sexual per se. Resp.'s assertion that hate crimes typically involve strangers, would deprive a large segment of victims of protection from such crimes by non-strangers. After all, if crime is perpetuated on the basis of sexual orientation, race, gender or ethnicity, for example, does it matter whether or not the perpetrator and victim are acquainted? If so, savvy hate crime perpetrators need only select acquaintances to technically skirt around the penalties for hate crime violations. Sexual transgressions, by their very nature, are not only against the victim, but that victim as a member of a sexual class. The two are inseparable. Sexual harassment was not against the Pet. as a person, per se, but as a woman. Were the Petitioner a male, it is doubtful this case would include sexual harassment.

But these details are really irrelevant since what the appeal court did was deprive all non-employee/non-

applicants [in which group it mistakenly included Pet.] of any Bane Act protection, whether hate crime related or not. Since the Bane Act and United States Constitution and laws, whose protections the Bane Act guarantees, protect "any individual" from a host of transgressions, the appeal court cannot legally exclude Pet. nor others from Bane Act and United States Constitution and laws protection per the XIVth Amendment, which states that no state can deny "any person ...equal protection under the laws." (See Pet.'s Question 1) Thus, arguendo, even were the Resp.'s "specialized purposes" argument correct (which is questionable considering how the Bane Act reads) and even were Pet. not to qualify as a hate crimes victim, (which she does), the appeal court cannot blanketly deprive her or anyone else of guaranteed protection against hate crimes. The core issue is plain and simple, but with vastly pervasive implications.

The Bane Act reads: "Whenever a person or persons, whether or not acting under the color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States ...." The statute does not say that the Constitutional or US laws protected are limited to hate crimes, and to coin Defense's terminology -- the so-called "specialized purpose" of deterring hate crimes to the exclusion of other Constitutional and US law protections. In that case the statute might read "...rights secured by the Constitution or laws of the United States, except those whose protection is not specifically against hate crimes." That would exclude a great portion of

the Constitution and laws of the United States, and the Bane Act might have easier just listed the specific laws covered.

And as Question 2 brings forth, doesn't federal funding of the violator, in this case the UC, make the transgressions of Constitutionally protected rights all the more glaring? And as Question 3 asks, doesn't retaliation for complaint of and exposure of violation of Constitutional rights, violate free speech as guaranteed by Amendment I?

Regarding Resp.'s defense C. (Resp. at pages 7,8), the appeal court never gave Pet. an opportunity to explain what transgressions occurred from September 1994 to March 1995, nor to demonstrate the continuing pattern and practice of misconduct as it extended into that time frame. The appeal court itself, at App. B, page 17, characterized the alleged sexual harassment by quoting from the pleadings:

> "...Zelnik touching and leering at her and requesting that she put out... for him.
>
> "'In addition to numerous verbal threats against plaintiff, Zelnik also physically assaulted and battered plaintiff on numerous occasions in conjunction with defendant's verbal threats'; those threats were of ; severe and longlasting adverse repercussions if plaintiff exposed Zelnik's wrongful conduct or personal interest in and relationship with plaintiff to others.'"

Astoundingly, the appeal court did not find such acts "outrageous", or at least to pursue whether such acts

occurred during the period it was questioning. The court did not grant leave ato amend to achieve this, instead speaking in generalities about whether sexual harassment is necessarily outrageous, without knowing the specific acts referred to. Clearly the court's own characterization in quotations above reveal the outrageous nature of the conduct and make intentional infliction of emotional damages understandable.

This is another reason the case has broad implications, which can be used by the Resp. in the future. Regarding Defense D (Resp. At pages 8, 9) the appeal court did not give Petitioner leave to amend to clarify discrepancies between the pleadings of one attorney in relation to those of her then current attorney. More detrimentally to the judicial process the manner in which the appeal court handled the matter gives the message that if a new attorney attempts to honestly correct misstatements of a previous attorney, then there is a risk, or even likelihood, of case loss and that it would be in the attorney and client's interest to let misstated pleadings stand. Such a message can be fatal to proper judicial process and requires swift and unequivocal correction.

CONCLUSION

The Respondent tries to paint this case as unusual and unique. It is neither of these. It stems from an unfortunate ongoing widespread conduct, wherein academic perpetrators are shielded by respectable image and protection of the bastions of the University ivory tower. (App. F) If California cannot safeguard fundamental civil rights, Petitioner prays the US Supreme Court will.

Dated August 28, 2000

Carol Ann Levine

Carol Ann Levine,
Petitioner in Pro Per